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In The
Supreme Court of the United States

FRANK C. MINVIELLE, LLC,

Petitioner,

versus

ATLANTIC REFINING COMPANY, OXY U.S.A. INC., PACIFIC ENTERPRISES OIL CO. (USA), and MOSAIC GLOBAL OPERATIONS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the dismissal without prejudice of a removed action for lack of standing preclude a second action when the plaintiff acquires standing after the dismissal?

2. Does a district court have ancillary or supplemental jurisdiction to dismiss a removed action on grounds of *res judicata* if the plaintiff does not otherwise have standing under Article III and state law?

3. Is a federal court required to remand an action removed on grounds of diversity when the plaintiff has no standing under Article III or state law?

4. Should *Burford* abstention be applied to a *sui generis* Louisiana statute governing private claims for oilfield remediation that: (1) requires substantial involvement of the state's natural resources agency in the judicial decision making process; and (2) mandates an expedited *de novo* appeal that is incompatible with federal appellate rules and standards of review?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Honorable United States Court of Appeals for the Fifth Circuit whose judgment is sought to be reviewed are:

Frank C. Minvielle, LLC, Petitioner
Atlantic Refining Company, Respondent
OXY U.S.A. Inc., Respondent
Pacific Enterprises Oil Company (USA), Respondent
Mosaic Global Operations, Inc., Respondent

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

JURISDICTIONAL STATEMENT 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

CONCLUSION 22

APPENDIX

Opinion of the U.S. Court of Appeals for the Fifth Circuit filed July 24, 2009 ..... App. 1

Judgment of the U.S. Court of Appeals for the Fifth Circuit filed July 24, 2009 ..... App. 17

Memorandum Ruling on Motions for Summary Judgment from the U.S.D.C. for the Western District of Louisiana filed September 6, 2007 ..... App. 19

Judgment from the U.S.D.C. for the Western District of Louisiana filed September 6, 2007 ... App. 37

TABLE OF CONTENTS – Continued

Page

Memorandum Ruling on Motion for New Trial and/or to Amend Judgment from the U.S.D.C. for the Western District of Louisiana filed March 24, 2008 ..... App. 39

Memorandum Opinion – Ruling on Motion from the U.S.D.C. for the Western District of Louisiana filed January 12, 2005 ..... App. 50

Memorandum Opinion – Ruling on Motions from the U.S.D.C. for the Western District of Louisiana filed October 19, 2004 ..... App. 61

Judgment from the U.S.D.C. for the Western District of Louisiana filed October 19, 2004 ... App. 100

28 U.S.C.A. §1332. Diversity of Citizenship; amount in controversy; costs ..... App. 103

28 U.S.C.A. §1441. Actions removable generally ..... App. 112

La. Rev. Stat. Ann. §30:29. Remediation of oilfield sites and exploration and production sites ..... App. 116

TABLE OF AUTHORITIES

Page

CASES

Abortion Rights Mobilization Inc. v. Baker, 885 F.2d 1020 (2d Cir. 1989) 9

Boone v. Kurtz, 617 F.2d 435 (5th Cir. 1980) 11

Brereton v. Bountiful City Corp., 434 F.3d 1213 (10th Cir. 2006) 13

Burford v. Sun Oil, 319 U.S. 315 (1943) ..... *passim*

Garamendi v. Allstate Ins. Co., 47 F.3d 350 (9th Cir. 1995) 17

International Primate Protection League v. Administrators of Tulane Education Fund, 500 U.S. 72 (1991) 9

Jepsen v. Texaco, Inc., 1995 WL 607630 (10th Cir. 1995) 9

Lejeune Bros., Inc. v. Goodrich Petroleum Co., LLC, 981 So.2d 23 (La. App. 2007) 6, 7

Maine Ass'n of Interdep. Neighborhoods v. Comm'r, Maine Dep't of Human Servs., 876 F.2d 1051 (1st Cir. 1989) 9

McCarney v. Ford Motor Co., 657 F.2d 230 (8th Cir. 1981) 12

Melahn v. Pennock Ins., Inc., 965 F.2d 1497 (8th Cir. 1992) 21

Perry v. Globe Auto Recycling, Inc., 227 F.3d 950 (7th Cir. 2000) 7

TABLE OF AUTHORITIES – Continued

Page

Postal Telegraph Cable Co. v. Alabama, 155 U.S. 483 (1894) 21

Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996) 15, 16, 17, 18

Richards v. Jefferson County, 517 U.S. 793 (1996) 12

Royal Ins. Co. of Am. v. Quinn-L Capital Corp., 960 F.2d 1286 (5th Cir. 1992) 10, 11

Taylor v. Sturgell, 128 S. Ct. 2161 12

Thomas v. Ashley Inv. Co., Docket No. 38839, (5th Jud. Dist. Ct. for Richland Parish, LA) 21

Wheeler v. Travelers Inc. Co., 22 F.3d 534 (3d Cir. 1994) 9

STATUTES

28 U.S.C. § 1254 3

28 U.S.C. § 1332 3

28 U.S.C. § 1441 3

28 U.S.C. § 1447(c) 9

LA. ADMIN. CODE tit. 43, § 101 19

LA. REV. STAT. ANN. § 30:29 ..... *passim*

CONSTITUTIONAL PROVISIONS

United States Constitution, Article III 3, 8

TABLE OF AUTHORITIES – Continued

Page

RULES

Fed. R. Civ. Proc. R. 41(b).....7, 8

OTHER AUTHORITIES

17A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4245 (3d ed.) 21

PETITION FOR WRIT OF CERTIORARI

Petitioner Frank C. Minvielle, LLC respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 24, 2009. This judgment affirmed a dismissal of this case on summary judgment by the United States District Court for the Western District of Louisiana.

OPINIONS BELOW

Frank C. Minvielle, LLC v. Atlantic Refining Co., formerly known as Atlantic Richfield Co.; OXY U.S.A. Inc., formerly known as Cities Service Oil Co.; Pacific Enterprises Oil Co. (USA), formerly known as Sabine Production Co. Inc.; Mosiac Global Operations, Inc., formerly known as IMC Global Operations Inc., United States Court of Appeal for the Fifth Circuit, Civ. A No. 08-30399, July 24, 2009, not selected for publication in the Federal Reporter, reprinted in the appendix, App. 1-18.

Frank C. Minvielle, LLC v. Atlantic Refining Co., OXY U.S.A. Inc., Pacific Enterprises Oil Co. (USA), Mosiac Global Operations, Inc., United States District Court, Western District of Louisiana, Civ. A No. 05-1312, Memorandum Ruling on Motion for New Trial And/Or To Amend Judgment, entered March 24, 2008, not reported in F. Supp. 2d, Unpublished, reprinted in the appendix, App. 39-49.

Frank C. Minvielle, LLC v. Atlantic Refining Co., OXY U.S.A. Inc., Pacific Enterprises Oil Co. (USA), Mosiac Global Operations, Inc., United States District Court, Western District of Louisiana, Civ. A No. 05-1312, Memorandum Ruling on Motions for Summary Judgment, entered September 6, 2007, not reported in F. Supp. 2d, Unpublished, reprinted in the appendix, App. 37-38.

Frank C. Minvielle, LLC v. IMC Global Operations, Inc., United States District Court, Western District of Louisiana, Civ. A No. 03-1908, Memorandum Opinion – Ruling on Motion, entered January 12, 2005, not reported in F. Supp. 2d, Unpublished, reprinted in the appendix, App. 50-60.

Frank C. Minvielle, LLC v. IMC Global Operations, Inc., United States District Court, Western District of Louisiana, Civ. A No. 03-1908, Memorandum Opinion – Ruling on Motions, entered October 19, 2004, reported in F. Supp. 2d at 380 F. Supp. 2d 755, reprinted in the appendix, App. 100-02.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and

> Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S.C. Const. Art. III § 2, cl. 1.

28 U.S.C. § 1332, reprinted in the appendix, App. 103-11.

28 U.S.C. § 1441, reprinted in the appendix, App. 112-15.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on July 24, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

Frank Minvielle, LLC ("Minvielle") owns property located in Iberia Parish, Louisiana in the Loisel Oil and Gas Field. Minvielle alleges that its property (hereinafter "Property") was polluted by the defendants' oil and gas operations.

Minvielle's ancestor in title, Juliet Delcambre, entered into an Oil, Gas, and Mineral Lease with defendant Atlantic Refining Company ("ARCO") in 1961 ("1961 Lease"). The oil and gas operations alleged to have damaged the plaintiff's property were conducted under this 1961 Lease. Defendants IMC (Mosaic), Oxy, and Pacific are successors-in-interest to ARCO by means of sub-leases or assignments of the 1961 Lease.

Juliet Delcambre died in 1988. Her ownership of the Property passed by succession to her daughter, Juliet D. Cowan, and her grandchildren, Eleanor Cowan Brown, Finis Ewing Cowan, III, Tomas Disney Cowan, Virginia Cowan Richards, and Kathleen Cowan Shanfield (collectively, "the Cowans"). Juliet Cowan's husband, Finis, Jr., is a former federal district judge who handles the family's legal business. In August, 1998, the Cowans sold the Property to plaintiff Frank C. Minvielle, LLC. The act of sale to plaintiff did not contain a specific assignment of the right to sue for remediation damages.

Minvielle first filed suit for remediation damages in 2003 ("*Minvielle I*"). The suit was removed to federal court and thereafter dismissed without prejudice for lack of standing. The district court held that for Minvielle to have standing to sue for pre-acquisition property damages under Louisiana law, it must have an assignment of the Cowans' rights to sue because: (1) the Property was damaged during the period of the Cowans' ownership; and, (2) under Louisiana law, the right to sue for property damage is

a personal right that is not transferred upon transfer of the property absent a specific assignment in the Act of Sale. During the pendency of *Minvielle I*, Judge Cowan, seeking to protect his family from suit, agreed to obtain the required assignment from his family members. However, despite the best efforts of Judge Cowan and plaintiff, the required document was not signed until after *Minvielle I* had been dismissed. The dismissal entered in *Minvielle I* was *without prejudice*.

After obtaining the completed assignment, plaintiff re-filed its suit in the same state court in which *Minvielle I* was filed. This second suit ("*Minvielle II*") was promptly removed and dismissed for lack of standing. Minvielle appealed. At oral argument before the Fifth Circuit, plaintiff challenged federal subject matter jurisdiction on grounds of lack of standing and *Burford* abstention. The Fifth Circuit denied these jurisdictional challenges and affirmed the district court, finding that the federal district court had ancillary jurisdiction over *Minvielle II* and that the district court's *Minvielle I* decision precluded Minvielle from arguing in *Minvielle II* that it has standing to sue for environmental damages. The Fifth Circuit rejected Minvielle's *Burford* abstention arguments as "inapplicable" and untimely.

REASONS FOR GRANTING THE WRIT

I. Lack of standing in *Minvielle I* does not preclude a suit on the same grounds because Minvielle acquired standing after *Minvielle I* was dismissed without prejudice.

An amendment to the Act of Sale between Juliet Delcambre and Minvielle was signed by the Cowans and Minvielle after the judgment was entered dismissing *Minvielle I* without prejudice. In this amendment, the Cowans recited that they intended in the original sale to transfer their right to sue to Minvielle. Under Louisiana law, the amendment to the Act of Sale was sufficient to confer standing on Minvielle to sue for environmental damage to its property. *Lejeune Bros., Inc. v. Goodrich Petroleum Co., LLC*, 981 So. 2d 23, 29-30 (La. App. 2007) ("It is established that this right can be transferred to the succeeding property owner, but a specific assignment of this right is required to accomplish such a transfer.").[1]

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[1] The Fifth Circuit disingenuously seeks to create Louisiana law out of whole cloth by seizing upon an inartfully drafted sentence from the Louisiana Third Circuit's *LeJeune* decision, which states, "Two federal cases have expounded on the affect of the *Hopewell* decision upon Louisiana's longstanding rule that the right to damages conferred by a lease is a personal right that must be specifically assigned at the time of sale." *Lejeune Bros., Inc. v. Goodrich Petroleum Co., LLC*, 981 So. 2d 23, 31 (La. App. 2007). The Fifth Circuit points to this sentence as evidence that a landowners' right to sue cannot be assigned after a property

(Continued on following page)

This Court has yet to decide whether an assignee who has his own claims dismissed for lack of standing is precluded from establishing standing to bring a new action on claims he later acquires from a third party. In apparently the only Circuit decision directly on point, the Seventh Circuit in *Perry v. Globe Auto Recycling, Inc.*, 227 F.3d 950 (7th Cir. 2000), held that an assignee who lost his own case for lack of standing was not precluded from bringing a new action on claims he later acquired.

The facts of the present case are even stronger than the facts before the court in *Perry*. Perry's prior suit was dismissed on the merits with prejudice, whereas *Minvielle I* was dismissed without prejudice for lack of subject matter jurisdiction. Federal Rule of Civil Procedure 41(b) provides that a dismissal for lack of jurisdiction is not an adjudication on the

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sale is completed. There is no Louisiana case that has held that the right to sue for property damages cannot be assigned to the vendee after the sale. Reading the quoted sentence from the *LeJeune* opinion in context, the Third Circuit was merely alluding to the fact that property sales containing only a traditional transfer of warranties do not convey the personal right to sue for damages. No court in Louisiana has ever decided that a post-sale assignment of the right to sue for property damages is without effect. The Louisiana Civil Code provides that "*All rights* may be assigned with the exception of those pertaining to obligations that are strictly personal." The right to sue for property damages is a personal right, not a "strictly personal" right. Lastly, the quoted sentence from the *LeJeune* decision refers only to rights to damages conferred by a lease. The amendment to the Act of Sale at issue here purports to transfer both contractual *and tort* rights to sue.

merits. Fed. R. Civ. Proc. R. 41(b). The Fifth Circuit acknowledges that the judgment in *Minvielle I* was not a judgment on the merits. Yet, in *Minvielle II*, the district court and Fifth Circuit treated the dismissal of *Minvielle I* as if it were a dismissal on the merits.

II. The district court did not have ancillary or supplemental jurisdiction to dismiss this removed action on grounds of *res judicata* because the district court determined that plaintiff did not have standing under Article III or state law.

This case was removed on grounds of diversity removal jurisdiction. The district court dismissed for lack of subject matter jurisdiction based on Minvielle's purported lack of standing.[2] At oral argument in the Fifth Circuit, Minvielle asserted that the district court lacked subject matter jurisdiction and requested that the case be remanded to state court. The Fifth Circuit denied Minvielle's request, finding that the district court had "ancillary jurisdiction."

The propriety of removal turns upon the original jurisdiction of the district court. If the district court

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[2] *Minvielle II*, 05-cv-1312, Rec. Doc. 87 at 13. The district court in *Minvielle II* stated: "It is well settled that unless a plaintiff has standing, a federal district court lacks subject matter jurisdiction to address the merits of the case. In the absence of standing, there is no "case or controversy" between the plaintiff and defendant which serves as the basis for the exercise of judicial power under Article III of the constitution." *Id.* at 8.

lacked subject matter jurisdiction, the present case should have been remanded to state court: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case *shall* be remanded." 28 U.S.C. § 1447(c)(emphasis added). A district court does not have the discretion to dismiss a removed case for lack of subject matter jurisdiction. *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72, 89 (1991) (noting that literal words of § 1447(c) permit district court no discretion to dismiss). In other words, when a district court lacks subject matter jurisdiction, it must remand even in instances where it believes the case will likely be dismissed by the state court.[3] Because the district court determined that it lacked standing in *Minvielle II,* it was constitutionally required to remand. Instead, it dismissed the case.

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[3] The jurisprudence is replete with cases holding that the lack of standing in a removed case is a jurisdictional defect that requires remand. *Wheeler v. Travelers Ins. Co.*, 22 F.3d 534, 537 (3d Cir. 1994)("if a district court finds that a plaintiff in a removed case does not have standing, it will remand the case to state court"); *Abortion Rights Mobilization Inc. v. Baker*, 885 F.2d 1020, 1023 (2d Cir. 1989)(lack of standing to bring a suit divests the district court of jurisdiction); *Maine Ass'n of Interdep. Neighborhoods v. Comm'r, Maine Dep't of Human Servs.*, 876 F.2d 1051, 1053 (1st Cir. 1989)(holding that determination of no standing is a determination of no subject matter jurisdiction requiring remand); *see also Jepsen v. Texaco, Inc.*, 1995 WL 607630, 2 (10th Cir. 1995).

In an effort to justify the district court's failure to remand, the Fifth Circuit re-framed the jurisdictional issue as one involving an attempt by Minvielle to collaterally attack an adverse judgment. The Fifth Circuit reasoned that "[i]f the *Minvielle I* court should have remanded rather than granted summary judgment, its judgment could have been reversed on appeal, but Minvielle chose not to appeal. Accordingly, the judgment became final and is now insulated from Minvielle's collateral attack." Slip Op. at 6; App. at 6. However, the adverse judgment against Minvielle in *Minvielle I* was a judgment adverse to his standing to bring *his own* claim, not to his standing to bring the *Cowans'* claim that is alleged in *Minvielle II*. Further, the Fifth Circuit acknowledges that *Minvielle I* was dismissed without prejudice. In deciding not to appeal *Minvielle I*, Minvielle was entitled to rely on the fact that a dismissal without prejudice is, indeed, a dismissal *without prejudice*. Minvielle could not have reasonably foreseen that a dismissal of its own claims without prejudice would later result in a dismissal of the Cowans' claims.

Despite its acknowledgment that Minvielle's lack of standing in *Minvielle II* would ordinarily deprive the court of subject matter jurisdiction, the Fifth Circuit determined that the district court could nonetheless exercise its "ancillary jurisdiction" in *Minvielle II* "to secure or preserve the fruits and advantages of a judgment or decree rendered" in *Minvielle I*. Slip Op. at 7; App. at 7 (quoting *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 960 F.2d 1286, 1292 (5th Cir.

1992)). However, these "fruits and advantages" are limited to the district court's determination that Minvielle did not have standing to assert its own claim. The merits of the Cowans' claims were not determined in *Minvielle I*, nor was Minvielle's right to assert the Cowans' claims.

The Fifth Circuit, again relying on its own precedent in *Royal Insurance*, concluded that ancillary jurisdiction was appropriate because "Minvielle's second suit, if successful, would nullify the district court judgment in *Minvielle I*." This statement is plainly wrongheaded. A judgment finding that Minvielle has standing to bring the *Cowans'* claims cannot under any reasonable scenario nullify a judgment finding that Minvielle does not have standing to bring *its own* claims.

III. The Fifth Circuit misapplied the doctrine of *res judicata*.

Realizing that a lack of standing would require remand, the Fifth Circuit was forced to resort to *res judicata* as the linchpin of its decision to affirm the district court. However, *res judicata* in *Minvielle II* cannot bar a claim that was never asserted in *Minvielle I*. The Fifth Circuit notes that "'a second complaint cannot command a second consideration of the same jurisdictional claims.'" Slip Op. at 10; App. at 10 (quoting *Boone v. Kurtz*, 617 F.2d 435, 436 (5th Cir. 1980)). However, the jurisdictional claim asserted

by Minvielle in *Minvielle II* is different from the jurisdictional claim asserted in *Minvielle I*. In *Minvielle I*, Minvielle claimed standing to assert its own claims, whereas in *Minvielle II*, it seeks to assert the Cowans' claims.

A court's "decision to dismiss based on any of the doctrines under the justiciability heading [such as standing] should preclude relitigation of the same justiciability issue but not a second suit on the same claim even if arising out of the identical set of facts." *McCarney v. Ford Motor Co.*, 657 F.2d 230, 233-34 (8th Cir. 1981). In the present case, the Fifth Circuit correctly held that *res judicata* precludes relitigation of Minvielle's standing to bring its own claim. However, it incorrectly concluded that Minvielle's standing to assert the Cowans' claim was also precluded.

Last year, this Court observed that the broad application of claim and issue preclusion to nonparties "runs up against the 'deep rooted historic tradition that everyone should have his own day in court.'" *Taylor v. Sturgell*, 128 S. Ct. 2161, 2171 (2008)(quoting *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996)). The Cowans have not had their day in court to assert their claims. The Cowans were not parties in *Minvielle I*. The district court in *Minvielle I* held that the Cowans as former owners of the Property, *not Minvielle*, had the right under Louisiana law to seek remediation damages. It stands logic on its head to conclude, as the Fifth Circuit did, that *Minvielle I* can now be used to defeat the very claim that the

district court in *Minvielle I* found to be actionable but unasserted.

It is of critical importance to the Cowans that they have their day in court. The Cowans have assigned their rights to Minvielle. If Minvielle is denied the right to seek remediation by asserting these assigned rights against the defendants, the Cowans will be at risk of exposure to remediation claims by Minvielle. By dismissing Minvielle's claims in the present case, the Fifth Circuit has effectively denied the Cowans their day in court by means of an overly broad application of the doctrine of *res judicata*. The merits of the Cowans' claims will have been disposed of by dint of jurisdictional acrobatics. *Minvielle I* should not be allowed to serve as a *de facto* determination of the merits of the Cowans' claims. The district court concluded in *Minvielle I* that it lacked standing and was thereby prohibited from entering a judgement on the merits. *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1218 (10th Cir. 2006).

IV. *Burford* abstention applies to the Louisiana Oilfield Remediation Act.

For the first time on appeal, Minvielle asserted that *Burford* abstention applies and that, as a consequence, this case should be remanded. *See Burford v. Sun Oil*, 319 U.S. 315 (1943). Minvielle's *Burford* abstention claim is based on a 2006 Louisiana statute adopted specifically to regulate private claims for remediation of the State's innumerable oilfield sites.

See generally LA. REV. STAT. ANN. § 30:29-:29.1 (2008) (hereinafter "Louisiana Oilfield Remediation Act").

The Louisiana Oilfield Remediation Act is structured so that the state oilfield environmental agency and the courts are working partners with regard to the resolution of private claims for oilfield remediation damages. The statute requires that any private lawsuit seeking damages for remediation of an oilfield site be served on the Louisiana Department of Natural Resources ("LDNR"), the agency charged with the administration of state regulations concerning oil and gas sites, including the environmental regulations that pertain to those sites. The LDNR has a right to intervene in the case after it is served. After the judge or jury determines the responsible party or parties and awards damages, the case is referred to the LDNR for the determination of a "feasible plan" to remediate the property. This determination is made after an agency hearing. The case is then referred back to the district court. The district court must adopt the feasible plan approved by the LDNR, unless a party proves that another plan is more feasible. After a final feasible plan is determined, the court orders that the portion of the damages judgment needed to fund the feasible plan be deposited in the registry of the court. The money deposited in the registry of the court can only be used to fund the implementation of the feasible plan. Any unused funds are returned to the oil company defendants. Any appeal of the judgment of the trial court regarding the feasible plan is required to be

handled on an expedited basis by the appellate court. The statute mandates an appellate *de novo* review of the record. Once the judgment becomes final, the district court and the LDNR jointly supervise the implementation of the feasible plan.

This is a classic case for *Burford*-type abstention. In *Burford*, the plaintiff Sun Oil attacked an oilfield permit granted to Burford by the Texas Railroad Commission. This Court held that abstention was proper because under Texas law, "the Texas courts are *working partners* with the Railroad Commission in the business of creating a regulatory system for the oil industry." *Id.* at 326 (emphasis added). This is identical to the situation presented here. The state district and appellate courts in Louisiana are now "working partners" with the Louisiana Department of Natural Resources ("LDNR") in the resolution of private oilfield remediation claims.

A. *Burford/Quackenbush* require that the case involve a claim that is equitable in nature.

The powers accorded the district courts and LDNR in developing and implementing the "feasible plan" required by the Louisiana Oilfield Remediation Act are essentially equitable in nature. A plaintiff in a Louisiana oilfield remediation case no longer has the option to pursue a "damages only" remedy under Louisiana law. The equitable nature of the relief

sought by the plaintiff – the determination and implementation of the "feasible plan" – supports *Burford* abstention. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996).

While state regulation serves as a minimum requirement in the formulation of the feasible plan under the Louisiana Oilfield Remediation Act, the trial court is accorded considerable discretion to depart upward from the state regulation in adopting the final feasible plan: "The court shall adopt the plan approved by the department, unless a party proves by a preponderance of the evidence that another plan is a more feasible plan to adequately protect the environment and the public health, safety, and welfare." LA. REV. STAT. ANN. § 30:29(C)(5) (2008). Further, the trial court is accorded considerable discretion in the implementation and oversight of the final feasible plan.[4]

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[4] The Act provides:

> The court shall retain jurisdiction over the funds deposited and the party or parties admitting responsibility or the party or parties found legally responsible by the court until such time as the evaluation or remediation is completed. If the court finds the amount of the initial deposit insufficient to complete the evaluation or remediation, the court shall, on the motion of any party or on its own motion, order the party or parties admitting responsibility or found legally responsible by the court to deposit additional funds into the registry of the court. Upon completion of the evaluation or remediation, the court shall order any funds remaining in the registry of the

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The remediation damages remedy that existed in Louisiana law during the pendency of *Minvielle I* – and prior to the passage of Act 312 of 2006 – has, to a significant degree, been replaced by a remedy that is similar to mandatory injunctive and declaratory relief. Accordingly, the present case is not a traditional damages case where the only relief sought is non-discretionary. Rather, there is considerable discretion accorded the trial court in awarding the relief sought. Thus, the "discretionary relief" requirement of *Burford* abstention is satisfied. *Quackenbush, supra*, 517 U.S. at 730.

Burford abstention has been denied in cases where the plaintiff's "sole" remedy is damages. *Id.*; *Garamendi v. Allstate Ins. Co.*, 47 F.3d 350, 354 (9th Cir. 1995). The remedy in the case *sub judice* is not solely damages and is substantially equitable and discretionary in nature. In fact, the trial judge's adoption of a particularly robust remediation plan might, in some circumstances, swallow entirely the plaintiff's

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> court to be returned to the depositor. The department and the parties shall notify the court of the completion of any evaluation or remediation.

LA. REV. STAT. ANN. § 30:29(D)(4) (2008).

It continues: "The court and the department shall retain oversight to ensure compliance with the plan. The party or parties admitting responsibility or the party or parties found legally responsible by the court shall file progress reports periodically as the court or the department may require." *Id.* § 30:29(F).

damage award. *See generally* LA. REV. STAT. ANN. § 30.29.

B. Louisiana's strong interest in uniform application of environmental standards outweighs federal interest in having diversity cases tried in federal court, and exercise of federal jurisdiction would potentially disrupt state statutory scheme.

This Court has required federal courts to abstain under *Burford* when the State's interests in "maintaining 'uniformity in the treatment of an 'essentially local problem' and retaining local control over 'difficult questions of state law bearing on policy problems of substantial public import'" outweigh "the strong federal interest in having certain classes of cases, and certain federal rights, adjudicated in federal court." *Quackenbush, supra*, 517 U.S. at 728. Louisiana's interest in maintaining uniformity in the application of remediation standards in oilfield contamination cases is reflected in the requirement that Louisiana environmental standards be applied in the development and implementation of the "feasible plan" adopted pursuant the Louisiana Oilfield Remediation Act:

> "Feasible Plan" means the most reasonable plan which addresses environmental damage in conformity with the requirements of Louisiana Constitution Article IX, Section 1 to protect the environment, public health, safety and welfare, *and is in compliance with the*

> *specific relevant and applicable standards and regulations promulgated by a state agency in accordance with the Administrative Procedure Act* in effect at the time of clean up to remediate contamination resulting from oilfield or exploration and production operations or waste.

LA. REV. STAT. ANN. § 30:29(I)(3) (2008) (emphasis added). The regulations adopted pursuant to the Louisiana Oilfield Remediation Act are set forth in Chapter 6 of Statewide Order 29-B. *See generally* LA. ADMIN. CODE tit. 43, § 101. These regulations require the application of the environmental standards set forth in Statewide Order 29-B in the development of feasible plans under the Louisiana Oilfield Remediation Act. *See id.* § 607.

The principal reasons for the enactment of the Louisiana Oilfield Remediation Act were: (1) to ensure that *state* environmental regulations are uniformly applied to the remediation of legacy oilfield sites in Louisiana; and, (2) to ensure that the *state* constitutional mandate to protect the public safety and health is carried out. LA. REV. STAT. ANN. § 30:29(A), (C)(3) & (I)(3) (2008). The "feasible plan" mandated by the statute is the plan that both satisfies state regulatory standards *and* "protect[s] the environment, public health, safety and welfare" of Louisiana citizens. *Id.* § 30:29(I)(3).

Additionally, and similar to the Texas statutory permitting scheme in *Burford*, the Louisiana Oilfield Remediation Act gives Louisiana a unified scheme for

review of its administrative orders rendered in oilfield remediation cases. State district court review of the LDNR's orders relating to the feasible plan is governed by a special statutory provision set forth in the Act. *Id.* § 30:29(C)(5). No final judgment can be rendered in a remediation case without first submitting the case to the agency for review after the trial on the merits in the district court. *Id.* § 30:29(C). Further, the normal appeals process in state court is substantially modified in that the state intermediate appellate court must conduct a *de novo* expedited appeal and is empowered to render its own version of the feasible plan if it deems the plans developed by the court and the LDNR to be deficient. *Id.* § 30:29(C)(6)(b) & (c).

This type of appellate treatment is unavailable in the federal system. Federal intervention in Louisiana's Louisiana Oilfield Remediation Act cases on grounds of diversity would have a disruptive effect on the Louisiana statutory scheme and on the state's efforts to establish a coherent policy on a matter of substantial public concern.

C. State participation as an intervening party would cause further disruption.

The Louisiana Oilfield Remediation Act accords the State the right to intervene in this proceeding. LA. REV. STAT. ANN. § 30:29(B)(2) (2008). The State has the option to intervene before the merits trial, during the agency proceeding (to seek a declaratory

ruling by the judge), or prior to the post-trial contradictory hearings wherein the court determines the final remediation plan. Also, the State might intervene at the conclusion of the case to seek its fees and costs. *Id.* § 30:29(E)(2). In other words, *the State can intervene at any time*. If the State does decide to intervene, the federal district court would lose its jurisdiction because a state cannot be a citizen of itself for diversity purposes. *Postal Telegraph Cable Co. v. Alabama,* 155 U.S. 482 (1894). It would constitute a waste of judicial resources for the district court to hear a substantial part of a remediation case only to find that it cannot complete the case due to the State's decision to intervene at the latter stages of the proceeding.[5]

D. Abstention should result in remand.

If this Court determines that *Burford* abstention applies, this case must be remanded to state court. *Melahn v. Pennock Ins., Inc.*, 965 F.2d 1497, 1501 (8th Cir. 1992); *see also* 17A CHARLES ALAN WRIGHT &

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[5] This risk of a late intervention by the State is not merely theoretical. For instance, the case captioned *Thomas v. Ashley Inv. Co.*, Docket No. 38839, (5th Jud. Dist. Ct. for Richland Parish, LA), was filed on November 17, 2005. The State intervened recently, after 55 depositions had been taken and the case had been pending for three and a half years.

ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4245 (3d ed.).

CONCLUSION

Minvielle had standing in *Minvielle II* to assert the claims of the Cowans that were assigned to Minvielle after *Minvielle I* was dismissed without prejudice. The district court in *Minvielle I* determined that under Louisiana law, the Cowans, not Minvielle, had the right to claim remediation damages. Therefore, the judgment in *Minvielle I* cannot logically preclude the assertion of the Cowans' claims by Minvielle in *Minvielle II*.

Further, if Minvielle had no standing to assert the claims of the Cowans, the district court did not have jurisdiction to dismiss the case. A lack of justiciability requires remand even in cases where it is likely that the state court on remand will dismiss the case. The Fifth Circuit's reliance on the doctrine of ancillary jurisdiction was misplaced, as the fruits and advantages of the district court's judgment in *Minvielle I* do not include the preclusion of claims that were never asserted in *Minvielle I*.

Finally, this case should have been remanded on the basis of *Burford* abstention.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-30399

FRANK C MINVIELLE LLC

Plaintiff-Appellant

v.

ATLANTIC REFINING CO, formerly known as Atlantic Richfield Co; OXY USA INC, formerly known as Cities Service Oil Co; PACIFIC ENTERPRISES OIL CO (USA), formerly known as Sabine Production Co Inc; MOSAIC GLOBAL OPERATIONS INC, formerly known as IMC Global Operations Inc

Defendants-Appellees

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 6:05-cv-1312

(Filed Jul. 24, 2009)

Before JOLLY, PRADO, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent

(Continued on following page)

Plaintiff-Appellant Frank C. Minvielle, LLC ("Minvielle") appeals the district court's order awarding summary judgment to Defendants-Appellees Atlantic Refining Co. ("Atlantic Refining"), OXY USA, Inc. ("Oxy"), Pacific Enterprises Oil Co. ("Pacific Oil"), and Mosaic Global Operations, Inc. ("Mosaic") (collectively "Appellees") on the ground of res judicata. For the following reasons, we AFFIRM.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

This appeal arises from the second of two lawsuits in which Minvielle has asserted materially identical claims for alleged environmental damage stemming from a nearly fifty-year-old oil lease.

In September 1961, Juliet Bourgeois Delcambre ("Delcambre") entered into an oil, gas, and mineral lease (the "1961 lease") with Atlantic Refining to explore and drill for oil on land that she owned in Iberia Parish, Louisiana ("the property"). Pursuant to the lease, a well was drilled on the property, and various companies operated the well according to the terms of an Operating Agreement between Atlantic Refining and the other companies. Appellees in this case are former parties to or the assignees and/or

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except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

successors-in-interest of the parties to this agreement.

In 1974, Petro-Lewis Funds, Inc. ("Petro-Lewis") purchased an interest in the property and became the operator of the well. In December 1977, it plugged and abandoned the well and the lease expired. When Delcambre died over a decade later, her daughter and grandchildren ("the Cowans") inherited the property. In 1998, the Cowans sold the property to Minvielle & Segura, LLC by an Act of Cash Sale, retaining a one-half mineral interest. In November 2001, Frank C. Minvielle acquired full ownership of Minvielle & Segura, LLC and changed its name to Frank C. Minvielle, LLC.

B. *Minvielle I*

In August 2003, Minvielle sued, among others, IMC Global Operations, Inc. ("IMC") – Petro-Lewis's successor and Mosaic's predecessor – in Louisiana state court, bringing both contract and tort claims for alleged contamination of the property. The defendants removed to the Western District of Louisiana on the basis of diversity, *see Frank C. Minvielle, L.L.C. v. IMC Global Operations, Inc. (Minvielle I)*, 380 F. Supp. 2d 755 (W.D. La. 2004), after which all remaining defendants except IMC were dismissed. IMC filed various motions to dismiss, including one under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, which the district court converted to a motion for summary judgment. The

court granted the motion. As to the contract claims, the court explained that under Louisiana law the right to sue for the property damage is a personal right, and it found both that Minvielle did not receive an assignment of the right to sue for prior damages from the Cowans at the time of the sale and that the 1961 lease did not create a stipulation *pour autrie* in Minvielle's favor. *Id.* at 766, 770. It therefore held that Minvielle lacked standing to bring the contract claims against IMC. *Id.* at 770. As to the tort claims, the court noted that under Louisiana law, "the owner of land at the time of the alleged damages is the person with the real and actual interest to assert the claim for damages to the land," *id.* at 770, and that Minvielle sought damages arising from operations that occurred prior to its purchase of the property, *id.* at 772. Accordingly, it found that Minvielle lacked standing to bring the tort claims against IMC.[1] *Id.*

Minvielle moved for reconsideration, arguing that at the time of the 1998 Act of Cash Sale, the Cowans intended to convey all rights to Minvielle & Segura, including the right to sue for past damages to the property. In support, Minvielle asserted that it had procured an amendment to the Act of Cash Sale

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[1] On the same day that the court granted IMC's motion for summary judgment, IMC filed a third-party complaint against Atlantic Refining, Oxy, and Pacific Oil, among others, asserting claims for contribution on the ground that each was a former party to or successor-in-interest of a party to the Operating Agreement. Because of the court's decision in its favor, however, IMC never served this complaint.

reflecting this purported agreement, and it informed the court that it would file the document with the court. Minvielle, however, never filed the purported amendment. On January 12, 2005, the district court denied Minvielle's motion for reconsideration, reiterating its previous ruling and noting that Minvielle had neither amended the Act of Cash Sale nor demonstrated that a Louisiana court would allow such an amendment. Minvielle did not appeal the judgment, and it became final.

C. *Minvielle II*

In June 2005, Minvielle again filed suit in Louisiana state court, alleging claims identical to those in *Minvielle I,* against, among others, Atlantic Refining – an original party to the 1961 lease – and IMC, Oxy, and Pacific Oil, each of which it concedes is a successor-in-interest by sublease or assignment of the 1961 lease. Mosaic was substituted for IMC, and it removed the case to the Western District of Louisiana on the basis of diversity. *See Frank C. Minvielle, LLC v. Atl. Ref. Co. (Minvielle II),* Civil Action No. 05-1312, 2007 WL 2668715 (W.D. La. Sept. 6, 2007). Minvielle expressly stated in its complaint that the claims in this suit were identical to those in *Minvielle I* and further agreed with the district court that "there's nobody who sits at the table in [*Minvielle II*] that didn't sit [at] the table [in *Minvielle I*]." However, Minvielle argued that it now had standing to assert its claims because, after the final judgment in *Minvielle I,* it executed an

amendment to the Act of Cash Sale – the same purported amendment discussed in *Minvielle I* – which provided that the parties to that agreement intended to assign to Minvielle the right to sue for previous damage to the property. Notably, the alleged amendment, by its very terms, did not amend the Act of Cash Sale or confer any new rights upon Minvielle; rather, as Minvielle acknowledged, it purported only to clarify the original intentions of the parties to the agreement.[2] Minvielle nonetheless argued that the amendment gave it standing to sue.

Appellees moved to dismiss on the ground of res judicata, arguing that Minvielle could not relitigate the question of its standing to assert contract and tort claims against them, as this was the exact same issue the court decided in *Minvielle I*. The district court converted the motion into one for summary judgment and granted it. In so doing, the district court explained that "[t]he claims asserted are identical to those asserted in *Minvielle I*, there is commonality of parties, and the court's jurisdictional ruling in *Minvielle I* is a final and valid judgment." *Id.* at *7.[3] It

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[2] Under Louisiana law, an actual amendment attempting to change the original agreement would have been ineffective. *See Lejuene Bros. v. Goodrich Petroleum Co.*, 981 So. 2d 23, 31 (La. Ct. App. 2007) (noting "Louisiana's longstanding rule that the right to damages conferred by a lease is a personal right that must be specifically assigned at the time of sale").

[3] Although the district court's opinion in *Minvielle II* analyzes only the question of *Minvielle I*'s res judicata effect on

(Continued on following page)

further noted that the amendment to the Act of Cash Sale – which by its terms did not convey new rights and which even Minvielle's counsel acknowledged was merely an "act of correction" and "clarification" – did not cure the res judicata effect of the *Minvielle I* judgment. *See id.* at *6.

II. JURISDICTION AND STANDARD OF REVIEW

At oral argument, Minvielle challenged, for the first time, the subject-matter jurisdiction of the district court in *Minvielle I* and *II* and of this court in this appeal, and we ordered supplemental briefing. Having reviewed the briefing, we find Minvielle's contentions to lack merit.

As a preliminary matter, although the district court in *Minvielle I* certainly had jurisdiction to determine its own jurisdiction, *see United States v.*

Minvielle II, the court appears to have ruled for Appellees on two grounds:

> Accordingly, defendants' motions for summary judgment based on res judicata are GRANTED. Because the *Minvielle I* finding that plaintiff did not have standing has res judicata effect, the court in the instant case does not have subject matter jurisdiction.

Minvielle II, 2007 WL 2668715, at *7. Given that the district court addressed the entirety of its opinion to the question of res judicata and expressly granted Appellees' motion on that ground, we agree with Appellees that the court's single mention of jurisdiction in its concluding statement can be disregarded as erroneous and unnecessary dicta.

Ruiz, 536 U.S. 622, 628 (2002); *Habetz ex rel. Habetz v. La. High Sch. Athletic Ass'n*, 915 F.2d 164, 167 (5th Cir. 1990), Minvielle challenges the propriety of removal in *Minvielle I*, arguing that the case should have been remanded to state court. The Supreme Court has explained, however, that "[a] party that has had an opportunity to litigate the question of subject-matter jurisdiction may not . . . reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of res judicata apply to jurisdictional determinations – both subject matter and personal." *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982); *cf. Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 960 F.2d 1286, 1293 (5th Cir. 1992) ("If the parties against whom judgment was rendered did not appeal, the judgment becomes final and the court's subject matter jurisdiction is insulated from collateral attack.") This is true even if the earlier judgment was incorrect. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) ("Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case."). If the *Minvielle I* court should have remanded rather than granted summary judgment, its judgment could have been reversed on appeal, but Minvielle chose not to appeal. Accordingly, the judgment became final and is now insulated from Minvielle's collateral attack. *See Des Moines Navigation & R.R. Co. v. Iowa Homestead Co.*, 123 U.S. 552, 559 (1887).

The district court also had jurisdiction in *Minvielle II*. As we have explained,

> It is well settled that a federal district court can exercise ancillary jurisdiction over a second action in order to secure or preserve the fruits and advantages of a judgment or decree rendered by that court in a prior action. Such jurisdiction is appropriate where the effect of an action filed in state court would effectively nullify the judgment of a prior federal action. This is true even where the federal district court would not have jurisdiction over the second action if it had been brought as an original suit.

Royal Ins. Co. of Am., 960 F.2d at 1292 (citations, alteration, and internal quotation marks omitted). This is precisely the case here. Notwithstanding Minvielle's attempt to frame the issue below as a question of standing, the issue was simply one of res judicata – whether the court's *Minvielle I* decision precluded Minvielle from arguing that it has standing to sue for the alleged environmental damages in *Minvielle II*. The question of standing is precisely the question that *Minvielle I* addressed, and there have been no changed circumstances that would warrant bypassing the bar of res judicata. Minvielle's second suit, if successful, would nullify the district court's judgment in *Minvielle I*. Thus, the *Minvielle II* court properly had ancillary jurisdiction to preserve the effect of its *Minvielle I* judgment.

We have jurisdiction over the district court's final order granting Appellees summary judgment under 28 U.S.C. § 1291.[4] "We review the district court's grant of summary judgment *de novo,* applying the same legal standards as the district court." *Aubris Res. LP v. St. Paul Fire & Marine Ins. Co.*, 566 F.3d 483, 486 (5th Cir. 2009). "The *res judicata* effect of a prior judgment is a question of law that we review *de novo.*" *Davis v. Dallas Area Rapid Transit*, 383 F.3d 309, 313 (5th Cir. 2004).

III. DISCUSSION

A. Choice of Law

Although each appellee moved to dismiss *Minvielle II* on the basis of res judicata, the parties do not appear to agree on whether Louisiana or federal res judicata law applies.[5] Under our pre-2001

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[4] In its supplemental briefing, Minvielle argues for the first time that this court should abstain from exercising its jurisdiction under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). As the issue on appeal is simply the res judicata effect of a prior judgment, however, *Burford* abstention is inapplicable. To the extent that Minvielle seeks to collaterally attack the final, unappealed judgment in *Minvielle I* on this ground, we reject its argument as untimely.

[5] Atlantic Refining does not differentiate between federal and Louisiana res judicata law, Mosaic argues that Louisiana law applies, Oxy and Pacific argue that Louisiana law applies but, alternatively, that federal res judicata law should apply, and Minvielle argues that the court should look to Louisiana law. The district court, without much discussion, applied Louisiana res judicata law.

precedent, federal res judicata law would clearly apply. *See Mowbray v. Cameron County,* 274 F.3d 269, 281 (5th Cir. 2001) ("We apply federal law to determine the preclusive effect of a federal judgment, even if that judgment was based on state law.") However, in *Semtek International Inc. v. Lockheed Martin Corp.,* 531 U.S. 497 (2001), the Supreme Court suggested that state res judicata law, incorporated as federal common law, should apply. There, the Court held that "federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity," but it adopted "as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the federal diversity court sits." *Id.* at 508. As we have explained, the *Semtek* Court held "that while federal law ultimately determines whether a federal judgment precludes a subsequent action or argument, when the basis of the original court's jurisdiction is diversity of citizenship, federal courts should apply the law of the forum state unless the state law is incompatible with federal interests." *Am. Home Assurance Co. v. Chevron, USA, Inc.,* 400 F.3d 265, 271 n.20 (5th Cir. 2005) (citing *Semtek,* 531 U.S. at 508). *But see Harper Macleod Solicitors v. Keaty & Keaty,* 260 F.3d 389, 396 n.7 (5th Cir. 2001) ("*Semtek* did not address the role of state law in determining the preclusive effect of *jurisdictional findings* made by a federal court sitting in diversity.").

In this case, however, we need not weigh the effect of *Semtek,* as Louisiana courts "'have repeatedly confirmed that federal law is applicable to consideration of whether a federal court judgment has res judicata effect.'" *Jones ex rel. Jones v. GEO Group, Inc.,* 6 So. 3d 1021, 1025 (La. Ct. App. 2009) (quoting *Green v. Iberia Par. Sch. Bd.,* 945 So. 2d 940, 943 (La. Ct. App. 2006)). Thus, whether we look to Louisiana law or federal law to provide the rule of decision, the result is the same: federal res judicata law applies.

B. Res Judicata

Under federal law, the test for res judicata contains four elements:

> (1) the parties are identical or in privity; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action was concluded by a final judgment on the merits; and (4) the same claim or cause of action was involved in both actions.

Test Masters Educ. Servs., Inc. v. Singh, 428 F.3d 559, 571 (5th Cir. 2005) (citing *Petro-Hunt, L.L.C. v. United States,* 365 F.3d 385, 395 (5th Cir. 2004)). Here, the second and fourth elements are not in dispute. Both *Minvielle I* and *II* arise out of the same alleged breaches of contract and tortious conduct, Minvielle expressly admits that its claims in *Minvielle I* and *II* are identical, and, as explained above,

Minvielle cannot now challenge the jurisdiction of the district court in *Minvielle I,* which certainly had jurisdiction to determine its own jurisdiction. *See Ruiz,* 536 U.S. at 628; *Habetz,* 915 F.2d at 167. The only elements that Minvielle challenges are the first and third elements: whether the judgment in *Minvielle I,* which was final and unappealed, was a judgment on the merits, and whether the parties to each case are identical or in privity. Both challenges lack merit.

1. Judgment on the Merits

Minvielle first asserts that the *Minvielle I* decision was not a judgment on the merits. Although it is technically correct, this does not preclude application of res judicata in this case. In *Minvielle I,* the district court granted IMC summary judgment based upon Minvielle's lack of standing, a jurisdictional issue. *Cobb v. Cent. States,* 461 F.3d 632, 635 (5th Cir. 2006) ("[T]he issue of standing is one of subject matter jurisdiction. . . ."). Although a jurisdictional ruling is technically not an adjudication on the merits, "[i]t has long been the rule that principles of res judicata apply to jurisdictional determinations – both subject matter and personal." *Ins. Corp. of Ireland,* 456 U.S. at 702 n.9; *accord Beiser v. Weyler,* 284 F.3d 665, 673 (5th Cir. 2002). As we have explained,

> Although the dismissal of a complaint for lack of jurisdiction does not adjudicate the merit so as to make the case res judicata on the substance of the asserted claim, it does

> adjudicate the court's jurisdiction, and a second complaint cannot command a second consideration of the same jurisdictional claims.

Boone v. Kurtz, 617 F.2d 435, 436 (5th Cir. 1980) (per curiam). Thus, because the unappealed *Minvielle I* judgment – which adjudicated the question of Minvielle's standing to bring the claims it now asserts – is unquestionably final, it satisfies this res judicata requirement.

2. Identity of the Parties

Notwithstanding its previous agreement that "there's nobody who sits at the table in [*Minvielle II*] that didn't sit [at] the table in [*Minvielle I*]," Minvielle argues on appeal that res judicata cannot apply to Atlantic Refining, Oxy, and Pacific Oil, because they were not parties to *Minvielle I*.[6] Res judicata applies only when the parties in the second suit are identical to or in privity with the parties in the first suit. *Test Masters Educ. Servs., Inc.,* 428 F.3d at 571. Notably, as the Supreme Court recently reaffirmed in *Taylor v. Sturgell,* 128 S. Ct. 2161 (2008), the parties need not actually be identical: "nonparty preclusion may be justified based on a variety of pre-existing 'substantive legal relationship[s]' between the person to be bound and a party to the judgment. Qualifying

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[6] Minvielle concedes that IMC, now Mosaic, was a party in both *Minvielle I* and *II*.

relationships include, but are not limited to, preceding and succeeding owners of property . . . and assignee and assignor." *Id.* at 2172 (alteration in original, citations omitted).

Here, Minvielle expressly concedes in its brief that "IMC (Mosaic), Oxy, and Pacific are successors-in-interest by sub-lease or assignment of the original 1961 mineral lease between Delcambre and [Atlantic Refining]." It thus admits that Oxy and Pacific Oil are succeeding owners of property and/or assignees, and that Atlantic Refining is a preceding owner of property and/or assignor. Therefore, although Oxy, Pacific Oil, and Atlantic Refining were not parties to *Minvielle I,* the identity-of-the-parties requirement of res judicata is met.

Accordingly, all four elements required for res judicata to apply are satisfied, and the district court properly held the judgment in *Minvielle I* to be res judicata on this second suit.

IV. CONCLUSION

For the reasons stated above, we hold that the district court properly granted Appellees' motion for summary judgment on the basis of res judicata. We therefore AFFIRM the judgment of the district court.

AFFIRMED.

E. GRADY JOLLY, Circuit Judge, specially concurring:

I am happy to concur. The standing issue in these cases has always referred to the lack of statutory standing under Louisiana law because of the failure of the plaintiff to demonstrate a cognizable interest in the *res* at issue. The standing issue never constituted a challenge to the personal or subject-matter jurisdiction of the federal court. Consequently, it is quite correct to say that *Minvielle I* was a decision on the merits of the plaintiff's claim, that the case now before us is identical in all relevant respects to *Minvielle I,* and that res judicata is a bar to this case.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-30399

D.C. Docket No. 6:05-CV-1312

FRANK C MINVIELLE LLC

Plaintiff-Appellant

v.

ATLANTIC REFINING CO, formerly known as Atlantic Richfield Co; OXY USA INC, formerly known as Cities Service Oil Co; PACIFIC ENTERPRISES OIL CO (USA), formerly known as Sabine Production Co Inc; MOSAIC GLOBAL OPERATIONS INC, formerly known as IMC Global Operations Inc

Defendants-Appellees

Appeal from the United States District Court for the Western District of Louisiana, Lafayette

Before JOLLY, PRADO, and SOUTHWICK, Circuit Judges.

JUDGMENT

(Filed Jul. 24, 2009)

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

E. GRADY JOLLY, Circuit Judge, specially concurring:

ISSUED AS MANDATE: SEP 15 2009

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

FRANK C. MINVIELLE, LLC **CIVIL ACTION NO. 05-1312**

VS.

ATLANTIC REFINING CO. OXY USA, INC. PACIFIC ENTERPRISES OIL CO. MOSAIC GLOBAL OPERATIONS, INC.

MAGISTRATE JUDGE METHVIN BY CONSENT OF THE PARTIES

MEMORANDUM RULING ON MOTIONS FOR SUMMARY JUDGMENT
(Rec. Docs. 29, 35, 41, and 51)

(Filed Sep. 6, 2007)

Before the court are four motions for summary judgment filed by defendants Atlantic Refining Company ("ARCO"), Oxy USA, Inc. ("Oxy"), Pacific Oil Company ("Pacific") and Mosaic Global Operations, Inc. ("Mosaic") (collectively referred to as "movers").[1] Plaintiff, Frank C. Minvielle, LLC filed an opposition and movers filed replies.[2]

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[1] Rec. Docs. 29, 35, 41 51.

[2] Rec. Docs. 56, 63, 65.

Factual Background

The underlying facts of the case involve an Oil, Gas and Mineral Lease (hereinafter referred to as the "1961 lease") entered into on September 28, 1961, by ARCO and Juliet Bourgeois Delcambre, a previous owner of the land at issue, located in Iberia Parish. ARCO subsequently subleased the mineral rights to Callery Properties, Inc., which in turn conveyed its interest in the land to another company. The conveyances and subleasing continued, leaving a long list of oilfield companies having had some connection to the land at issue. During this time, movers also operated oil and gas exploration and/or production activities on the property.

In 1998, plaintiff's predecessor, Minvielle & Segura, L.L.C. purchased the land by Act of Cash Sale ("1998 Act of Cash Sale"). On November 30, 2001, Frank C. Minvielle acquired all ownership of Minvielle & Segura, L.L.C., and shortly thereafter changed its name to Frank C. Minvielle, L.L.C., plaintiff in this action.

Previous Litigation – Minvielle I

On August 27, 2003, plaintiff filed suit in the 16th Judicial District Court alleging that the land in question was contaminated or otherwise damaged by

oil and gas exploration and production activities.[3] Plaintiff named as defendants IMC Global Operations, Inc. ("IMC"), Encana Midstream, Inc., Estis Well Service, L.L.C., and Transok, Inc. The case, hereinafter referred to as "Minvielle I," was removed to this court on October 15, 2003 pursuant to diversity jurisdiction under 28 U.S.C. § 1332.

The only defendant remaining in the case is IMC.[4] IMC filed a third-party complaint against ARCO, Oxy, Pacific, Edwin Cox, and William Dick, alleging that the third-party defendants were former parties to, or successors-in-interest to the original parties to the 1961 Lease.

IMC filed several motions to dismiss, including one seeking dismissal based on plaintiff's lack of standing to assert contractual claims arising from the 1961 lease and tort claims arising prior to plaintiff's purchase of the land. Plaintiff responded that it had standing because it was a third party beneficiary the contract (a stipulation *pour autrui*) and because tort damages can be brought regardless of the timing of the damages.

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[3] *See Minvielle v. IMC et al,* 03CV1908, Rec. Doc. 1, Paragraphs 1 and 3.

[4] Estis Well Wervice, L.L.C. was dismissed on February 2, 2002, on a finding of fraudulent joinder. Transok, Inc. was dismissed on February 20, 2004, for plaintiff's failure to prosecute, and Encana was dismissed with prejudice on plaintiff's own motion. *See* Minvielle I, 03CV1908, Rec. Docs. 55, 95.

On October 19, 2004, this court dismissed plaintiff's claims for lack of standing.[5] The ruling was based on a finding that the 1998 cash sale did not confer on plaintiff a specific assignment of rights to recover damages from third parties, nor did the 1961 lease create a stipulation *pour autrui* in favor of plaintiff. The court concluded that plaintiff lacked standing to bring contractual claims arising from the 1961 lease. As to the tort claims, the court also concluded that plaintiff lacked standing because plaintiff was seeking damages arising from operations which occurred prior to plaintiff's acquisition of the land.

Plaintiff filed a motion for reconsideration, arguing that to the extent the 1998 cash sale was deficient, it would be amended to include the transfer of property rights to plaintiff. On January 12, 2005, the court denied plaintiff's motion, noting that plaintiff had not yet amended the 1998 Act of Cash Sale, nor had plaintiff established that such an amendment would properly convey standing.[6] Accordingly, plaintiff's case was dismissed and plaintiff did not appeal the judgment.

Instant Suit – Minvielle II

On June 20, 2005, plaintiff filed suit in the 16th Judicial District Court for the Parish of Iberia, alleging the same claims arising from the 1961 lease

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[5] *See* Minvielle I, 03CV1908, Rec. Docs. 104, 105.

[6] *See* Minvielle I, 03CV1908, Rec. Doc. 113.

as Minvielle I. Plaintiff named as defendants IMC, ARCO, Oxy, Pacific, Pioneer Production Corporation, Edwin L. Cox, and William J. Dick. Defendants Pioneer, Cox, and Dick were dismissed for plaintiff's failure to prosecute. Defendant Mosaic has been substituted for IMC, as its successor in interest.

The petition addresses the previous ruling by this court regarding standing, and the subsequent Amendment to Act of Cash Sale executed by the Cowans and plaintiff:

15.

> In 2003, plaintiff filed suit against IMC Global Operations, Inc., making claims identical to those brought herewith. That suit, captioned *Frank C. Minvielle, L.L.C. v. IMC Global Operations, Inc., et al* was removed to the United States District Court for the Western District of Louisiana (Civil Action No. 03-1908). In that suit, Magistrate Judge Mildred E. Methvin dismissed plaintiff's suit. She found that the 1998 act of sale from the Cowans to plaintiff did not include a specific assignment of rights to recover from third parties for damage done to the property prior to plaintiff's acquisition, and therefore plaintiff lacked standing to bring a restoration claim in contract or in tort. *Id.*, Judgment and Memorandum Opinion – Ruling on Motions (October 19, 2004).

16.

> By Amendment to Act of Cash Sale the Cowans and plaintiff specified:
>
> Sellers and each of them declared further that they did by virtue of the Act of Cash Sale, dated August 27, 1998, *et seq.*, accepted by Purchaser September 18, 1998, . . . assign, convey, sell, transfer and deliver, less the undivided one-half (½) of the oil, gas and other minerals, including sulphur, reserved and retained, all of their right, title, claim, interest, demand, surface and subsurface, real, personal and mixed, movable, immovable, corporeal and incorporeal, including claims for damages suffered by the aforedescribed tracts of land prior to September 18, 1998.[7]

The suit filed in the 16th JDC was removed to this court on July 22, 2005. Subsequently movers filed the following motions:

1. Rule 12(b)(1) Motion Requesting Deference to the Primary Concurrent Jurisdiction of the Louisiana Office of Conservation ("LOC") and the Louisiana Department of Environmental Quality ("DEQ");[8]

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[7] Rec. Doc. 1.

[8] Rec. Docs. 41, 35, 51.

2. Rule 12(b)(1) and/or 12(b)(6) motion to dismiss premature claims;[9]
3. Rule 12(e) motion for more definite statement;[10]
4. Motion for compliance with Rule 20 and 21 regarding improper joinder;[11]
5. Rule 12(b)(7) motion dismiss for failure to join indispensable parties;[12]
6. Rule 12(b)(6) motion to dismiss for failure to state a claim for lack of standing, nonrecoverable damages, unjust enrichment, and prescription;[13]
7. Rule 12(b)(6) motion to dismiss claims as barred under res judicata.[14]

The 12(b)(6) motions (Paragraphs 6 and 7 above) were converted to motions for summary judgment since their disposition required reference to documents outside of the complaint.

Motion for Summary Judgment

The Federal Rules of Civil Procedure provide for summary judgment where no genuine issue as to any

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[9] Rec. Docs. 41, 35.

[10] Rec. Docs. 41, 35, 51.

[11] Rec. Docs. 35, 51.

[12] Rec. Docs. 35, 51.

[13] Rec. Docs. 41, 35, 51.

[14] Rec. Docs. 29, 41, 35, 51.

material fact exists. Fed.R.Civ.P. 56(c). The threshold inquiry is whether there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). Of course, the substantive law will identify which facts are material. *Id.* All of the evidence must be reviewed in the light most favorable to the motion's opponent. *Id.* However, the Fifth Circuit has emphasized that summary judgment should be granted and will be affirmed when the nonmoving party fails to meet its burden to come forward with facts and law demonstrating a basis for recovery that would support a jury verdict. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1071 (5th Cir. 1994).

Analysis

Although a litany of motions have been filed, the initial inquiry must be whether res judicata applies to this court's previous ruling that plaintiff lacks standing.

Res Judicata

Movers argue that the ruling in Minvielle I that plaintiff lacked standing to bring the claims was a finding that the court did not have subject matter jurisdiction, and is res judicata.

"Federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity." *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 121 S.Ct. 1021, 1028, 149 L.Ed.2d 32 (2001). Accordingly, federal courts apply the law of the forum state, unless the state's law is incompatible with federal interests, when the basis of the court's jurisdiction was diversity of citizenship. *American Home Assurance Co. v. Chevron, USA, Inc.*, 400 F.3d 265, 271 n. 20 (5th Cir.2005). "The purpose of both federal and state law on res judicata is essentially the same; to promote judicial efficiency and final resolution of disputes by preventing needless re-litigation." *Terrebonne Fuel & Lube, Inc. v. Placid Ref. Co.*, 95-654, p. 11 (La.1/16/96), 666 So.2d 624, 631.

In the case at bar, the Court, as a court sitting in diversity, applies Louisiana law to determine the preclusive effect of its prior judgments. Under Louisiana law, the phrase "res judicata" includes both claim preclusion (traditional res judicata) and issue preclusion (collateral estoppel). *Hudson v. City of Bossier*, 33,620, p. 7 (La.App.2d Cir.8/25/00), 766 So.2d 738, 743, writ denied, 00-2687 (La.11/27/00), 775 So.2d 450. Claim preclusion precludes the parties from relitigating matters that were or could have been raised in that action. Issue preclusion or collateral estoppel, however, precludes relitigation of an issue that has already been decided by the court in a previous action. "Thus, res judicata used in the broad sense has two different aspects: (1) foreclosure of relitigating matters

that have never been litigated, but should have been advanced in the earlier suit; and (2) foreclosure of relitigating matters that have been previously litigated and decided." *Id.*

Louisiana Revised Statute § 13:4231 provides:

> Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent: . . .
>
> (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.
>
> (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

Thus, "a second action is precluded when all of the following are satisfied: (1) the judgment is valid; (2) the judgment is final; (3) the parties are the same; (4) the cause or causes of action asserted in the second suit existed at the time of final judgment in the first litigation; and (5) the cause or causes of action asserted in the second suit arose out of the transaction or occurrence that was the subject matter

of the first litigation." *Burguieres v. Pollingue*, 843 So.2d 1049, 1053, 2002-1385 (La.. 2003).

Valid and final judgment

Plaintiff asserts that the judgment in Minvielle I cannot form the basis for a res judicata ruling in this case because the judgment was not a final judgment on the merits of the case, but rather was a ruling limited to whether there was a deficiency of parties.

The judgment dismissing Minvielle I specifically granted defendants' motions for summary judgment "for [plaintiff's] failure to state contractual and tort claims due to lack of standing."[15]

It is well settled that unless a plaintiff has standing, a federal district court lacks subject matter jurisdiction to address the merits of the case. In the absence of standing, there is no "case or controversy" between the plaintiff and defendant which serves as the basis for the exercise of judicial power under Article III of the constitution. *Warth v. Seldin*, 422 U.S. 490, 498-499, 95 S.Ct. 2197, 2206 (1975). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Thus, standing must be inquired into as part of the court's determination of whether it has subject matter

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[15] Rec. Doc. 105.

jurisdiction. *Golding v. Bartholow,* 166 F.3d 710 (5th Cir. 1999). If the court finds that it lacks subject matter jurisdiction, it has a duty to dismiss the case. Fed.R.Civ.P. 12(h)(3). Standing, therefore, determines the courts' "fundamental power even to hear the suit." *Grant ex rel. Family Eldercare v. Gilbert,* 324 F.3d 383, 386 (5th Cir. 2003) *citing Ford v. Nylcare Health Plans, Inc.*, 301 F.3d 329, 333 (5th Cir.2002).

Thus, under the applicable law, the determination in Minvielle I that plaintiff did not have standing was equivalent to a finding that the court lacked subject matter jurisdiction.

Although a dismissal for lack of jurisdiction is not a ruling on the merits of the claim, both Louisiana and federal law hold that the "principles of res judicata apply to jurisdictional determinations." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 n. 9, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982); *see also Boone v. Kurtz,* 617 F.2d 435, 436 (5th Cir.1980) ("Although the dismissal of a complaint for lack of jurisdiction does not adjudicate the merit[s] so as to make the case res judicata on the substance of the asserted claim, it does adjudicate the court's jurisdiction, and a second complaint cannot command a second consideration of the same jurisdictional claims."); *Royal Insurance Co. of America v. Quinn-L Capital Corp.*, 960 F.2d 1286 (5th Cir. 1992); *Hawthorne v. Couch,* 946 So.2d 288, 41,603 (La.App.2d Cir. 2006) (previous ruling of lack of subject matter jurisdiction given res judicata effect).

In *LoCicero v. Jefferson Parish Dept. of Fleet Management,* 722 So.2d 1205, 1209 (La.App. 5th Cir.1998), the court explained that a court's finding of lack of subject matter jurisdiction can be the basis for res judicata:

> [The] question here is whether a final judgment sustaining an exception of lack of subject matter jurisdiction can form the basis of an exception of res judicata in a second suit subsequently brought in the same court and based on the same transaction or occurrence . . .
>
> The purpose of the concept of res judicata is to put an end to disputes between the same parties which arise from the same transaction or occurrence, see La. R.S. 13:4231, Comments-1990(a). While we recognize that a judgment rendered on the merits by a court without subject matter jurisdiction is generally a nullity, that rule cannot be applied to a judgment like the present one where the decision initially made was simply whether the court could proceed further with the case. Pursuant to La.Code Civ. Pro., Art. 925(A)(6), relating to the declinatory exception of lack of jurisdiction over the subject matter of the action, district courts are required to exercise their threshold jurisdiction in deciding this issue. It would be anomalous indeed were it to be held that a judgment sustaining this exception would be a nullity for res judicata purposes in a subsequent suit in the same court. Such a ruling would permit endless

> re-litigation of that issue in direct contravention of the policy underlying the concept of res judicata.

Id. at 1209-1210.

Thus, this court's jurisdictional ruling in Minvielle I is a final and valid judgment to which res judicata applies.

Parties

In order for res judicata to apply, there must be a commonality of parties. Identity of parties does not mean the parties must be the same physical parties. When one party's interests were adequately represented by another party to an earlier action who may be considered their virtual representative because their interests are closely aligned, their presence in a later litigation does not disrupt the res judicata analysis. *Forum for Equality, PAC v. McKeithen*, 893 So.2d 738, 745 (La. 2005) (addition in second suit of three new plaintiffs' whose interests were closely aligned to original plaintiffs did not preclude res judicata application).

In Minvielle I plaintiff sued IMC. In Minvielle II, plaintiff sued IMC's successor Mosaic, and ARCO, Oxy, and Pacific. Although ARCO, Oxy, and Pacific were not named as defendants by plaintiff in Minvielle I, they were the subject of a third-party complaint filed by IMC. Although the case was dismissed prior to ARCO, Oxy, and Pacific having made an

appearance, they were nonetheless named parties to the litigation.

Furthermore, ARCO, Oxy, and Pacific are former parties to, or successors-in-interest to the original parties to the 1961 Lease. The complaint in Minvielle II states that the defendants are joint tortfeasors and because "the negligence, acts and/or omissions of defendants have collectively contributed to plaintiff's pollution-related property damages, all defendants are solidarily liable for all damages sought in this litigation."

It is clear that, as joint tortfeasors, the defendants were closely aligned and their interests were adequately represented by IMC/Mosaic in Minvielle I. Accordingly, the requirement for identity of parties is met.

Existence of Causes of Action and Same Transaction or Occurrence

The central inquiry in applying the doctrine of res judicata is whether the cause of action in the second case arises out the same transaction or occurrence that was the subject of the first case. *Blanchard v. ABC Ins. Co.*, 38,005 p. 5 (La. App 2d Cir. 3/3/04), 867 So.2d 901. It is clear that the alleged causes of action asserted in Minvielle II existed at the time of Minvielle I and that the causes of actions arise from the same transaction or occurrence. In fact, the

Minvielle II complaint specifically states that claims in both suits are "identical."[16]

Although plaintiff argues that res judicata should not apply because the Amendment to Act of Cash Sale did not exist at the time of the first judgment, the existence of the amendment is irrelevant. The Act of Cash Sale between plaintiff and the Cowans does not form the basis for the allegations of negligence against defendants, but rather, the causes of action arise from defendants' alleged wrongdoings. The allegations as to defendants' alleged torts and contractual violations arising from the 1961 lease are the same in both Minvielle I and II.

Moreover, plaintiff offers no persuasive authority for the proposition that the Amendment to Act of Cash Sale cures the res judicata effect of the prior judgment. Plaintiff cites *Perry v. Globe Auto Recycling, Inc.*, 227 F.3d 950, 953 (7th Cir. 2000) for the proposition that an assignee who lost on his own claims was not precluded from bringing a new action on a claim acquired from another person. *Perry*, however, is distinguishable from the instant case. *Perry* did not involve a standing issue, nor does it address the effect of res judicata.[17] The facts of the case at bar are peculiar in that plaintiff lacked standing in

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[16] Rec. Doc. 1.

[17] Furthermore, this case is not authoritative because as discussed above, the law applicable to this determination is Louisiana law. Moreover, the case is not a 5th Circuit decision.

Minvielle I and is now attempting to cure the court's previous finding of lack of jurisdiction by filing an amended cash sale purporting to confer standing on plaintiff. Plaintiff has not cited any cases establishing that a dismissal for lack of standing/jurisdiction can be cured by a post-judgment attempt to confer standing to the same party who was previously adjudged to be without standing.

The claims asserted are identical to those asserted in Minvielle I, there is commonality of parties, and the court's jurisdictional ruling in Minvielle I is a final and valid judgment. Accordingly, all requirements for application res judicata are met.

Conclusion

The underlying facts and causes of action in Minvielle II are precisely the same as in Minvielle I, and the parties are virtually the same. Likewise, because the Minvielle I judgment regarding lack of subject matter jurisdiction is res judicata in this case, both cases have the same fatal flaw – lack of subject matter jurisdiction. Plaintiff's after-the-fact creation of a document purporting to create standing does not affect the preclusive effect of res judicata. To allow any other ruling in this case would thwart the fundamental principal of res judicata, i.e., that matters litigated and finally adjudged are presumed correct and not subject to collateral attack in a subsequent suit involving the same transaction or occurrence.

Accordingly, defendants' motions for summary judgment based on res judicata are **GRANTED**. Because the Minvielle I finding that plaintiff did not have standing has res judicata effect, the court in the instant case does not have subject matter jurisdiction. Since dismissal is proper for lack of subject matter jurisdiction, it is not necessary to address the remaining motions. *Ruhrgas AG v. Marathon Oil*, 526 U.S. 574 (1999); *Alpine View Co. Ltd. v. Atlas Copco AB*, 205 F.3d 208 (5th Cir. 2000).

Signed at Lafayette, Louisiana, on September 6, 2007.

/s/ Mildred E. Methvin

Mildred E. Methvin
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

FRANK C. MINVIELLE, LLC	**CIVIL ACTION NO. 05-1312**
VS.	
ATLANTIC REFINING CO. OXY USA, INC. PACIFIC ENTERPRISES OIL CO. MOSAIC GLOBAL OPERATIONS, INC.	**MAGISTRATE JUDGE METHVIN BY CONSENT OF THE PARTIES**

JUDGMENT

(Filed Sep. 6, 2007)

For the reasons set forth in the Memorandum Opinion filed this date,

IT IS ORDERED that defendants' motions for summary judgment based on res judicata are **GRANTED**, and this case is dismissed for lack of subject matter jurisdiction.

Signed at Lafayette, Louisiana, on September 6, 2007.

/s/ Mildred E. Methvin

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United States Magistrate Judge
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

FRANK C. MINVIELLE, LLC	**CIVIL ACTION NO. 05-1312**
VS.	
ATLANTIC REFINING CO. OXY USA, INC. PACIFIC ENTERPRISES OIL CO. MOSAIC GLOBAL OPERATIONS, INC.	**MAGISTRATE JUDGE METHVIN BY CONSENT OF THE PARTIES**

MEMORANDUM RULING ON MOTION FOR NEW TRIAL AND/OR TO AMEND JUDGMENT (Rec. Docs. 89 and 91)

(Filed Mar. 24, 2008)

On September 6, 2007, the undersigned issued a Memorandum Ruling dismissing this case for lack of subject matter jurisdiction.[1] Judgment was entered the same day.[2] On September 20, 2007, plaintiff filed the instant motion under Rule 59 for new trial and/or

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[1] Rec. Doc. 87.

[2] Rec. Doc. 88.

to amend or alter judgment.[3] Defendants oppose the motion.[4]

Legal Analysis

The factual background is fully set forth in the memorandum ruling of September 6, 2007, and will not be repeated here. The ruling concluded that the Minvielle I judgment regarding lack of subject matter jurisdiction is *res judicata* in this case. Plaintiff contends that the judgment should be vacated and plaintiff should be allowed a new trial because *res judicata* is inapplicable and plaintiff has standing to sue ARCO.

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[3] Rec. Docs. 89 and 91. Although plaintiff filed two separate motions, the motions rely on the same memorandum in support.

Oxy incorrectly asserts that the motion was filed untimely. A motion filed under Rule 59 must be filed within 10 days of judgment. According to Rule 6(a) the day of the act (entry of judgment) is not included in the time period. Moreover, "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." Here, the judgment was entered on September 6, 2007. Using the foregoing formula, the deadline for filing a motion under Rule 59 was September 20, 2007, which is the date that plaintiff filed the motion. Accordingly, the motion was filed timely.

[4] Rec. Docs. 95-98.

The court has considerable discretion to grant or deny a motion under Rule 59.[5] *Whitehead v. Food*

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[5] Rule 59 provides as follows:

Rule 59. New Trial; Altering or Amending a Judgment

(a) In General.

(1) Grounds for New Trial. The court may, on motion, grant a new trial on all or some of the issues – and to any party – as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(2) Further Action After a Nonjury Trial. After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(b) Time to File a Motion for a New Trial. A motion for a new trial must be filed no later than 10 days after the entry of judgment.

(c) Time to Serve Affidavits. When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 10 days after being served to file opposing affidavits; but that period may be extended for up to 20 days, either by the court for good cause or by the parties' stipulation. The court may permit reply affidavits.

(Continued on following page)

Max of Mississippi, Inc., 163 F.3d 265 (5th Cir. 1998); *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350, 355 (5th Cir.1993); *Lavespere*, 910 F.2d at 174. The court must "strike the proper balance between the need for finality and the need to render a just decision on the basis of all the facts." *Bohlin*, 6 F.3d at 355. It is well established that a party may not use Rule 59(e) to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the court order. *See Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004); *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir.1990).

Res judicata: As set forth in the September 6th ruling, "[t]he purpose of both federal and state law on res judicata is essentially the same; to promote judicial efficiency and final resolution of disputes by preventing needless re-litigation." *Terrebonne Fuel & Lube, Inc. v. Placid Ref. Co.*, 95-654, p. 11 (La.1/16/96), 666 So.2d 624, 631.

> **(d) New Trial on the Court's Initiative or for Reasons Not in the Motion.** No later than 10 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.
>
> **(e) Motion to Alter or Amend a Judgment.** A motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment.

In this diversity case, the court must apply Louisiana law to determine the preclusive effect of its prior judgments.[6] Louisiana Revised Statute § 13:4231 provides:

> Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent: . . .
>
> (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.
>
> (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

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[6] Mosaic incorrectly asserts that federal law should be applied to the *res judicata* issue in this case. The case relied upon by Mosaic, however, pre-dates the Supreme Courts' ruling in *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 121 S.Ct. 1021, 1028, 149 L.Ed.2d 32 (2001) ("Federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity.") Federal courts, therefore, apply the law of the forum state, unless the state's law is incompatible with federal interests, when the basis of the court's jurisdiction was diversity of citizenship. *American Home Assurance Co. v. Chevron, USA, Inc.*, 400 F.3d 265, 271 n. 20 (5th Cir.2005).

Thus, "a second action is precluded when all of the following are satisfied: (1) the judgment is valid; (2) the judgment is final; (3) the parties are the same; (4) the cause or causes of action asserted in the second suit existed at the time of final judgment in the first litigation; and (5) the cause or causes of action asserted in the second suit arose out of the transaction or occurrence that was the subject matter of the first litigation." *Burguieres v. Pollingue,* 843 So.2d 1049, 1053, 2002-1385 (La. 2003).

Plaintiff does not dispute that: the resolution of Minvielle I was a valid and final judgment; that the causes of action asserted in Minvielle II existed at the time of final judgment in Minvielle I; and that the causes of action in the two cases arose out of the same transaction or occurrence. Plaintiff's sole contention is that because the parties to the two suits were not identical, *res judicata* should not apply.

Identity of parties does not mean that the parties must be identical. Identity exists when the same parties, their successors, or others appear so long as they share the same 'quality' as parties. *Sun Finance Co., Inc. v. Jackson,* 525 So.2d 532 (La.1988); *Welch v. Crown Zellerbach Corp.,* 359 So.2d 154 (La.1978). When one party's interests were adequately represented previously by a party whose interests are closely aligned, the presence of the first party in later litigation does not affect the *res judicata* analysis. *Forum for Equality, PAC v. McKeithen,* 2004-2551 (La. 1/19/05), 893 So.2d 738 (noting that parties are deemed "privies" when: (1) the nonparty is the

successor in interest of a party; (2) the nonparty controlled the prior litigation; or (3) the nonparty's interests were adequately represented by a party to the action who may be considered the "virtual representative" of the nonparty because the interests of the party and the nonparty are so closely aligned.").

The memorandum ruling addressed the identity of parties as follows:

> In order for res judicata to apply, there must be a commonality of parties. Identity of parties does not mean the parties must be the same physical parties. When one party's interests were adequately represented by another party to an earlier action who may be considered their virtual representative because their interests are closely aligned, their presence in a later litigation does not disrupt the res judicata analysis. *Forum for Equality, PAC v. McKeithen,* 893 So.2d 738, 745 (La. 2005) (addition in second suit of three new plaintiffs whose interests were closely aligned to original plaintiffs did not preclude res judicata application).
>
> In Minvielle I plaintiff sued IMC. In Minvielle II, plaintiff sued IMC's successor Mosaic, and ARCO, Oxy, and Pacific. Although ARCO, Oxy, and Pacific were not named as defendants by plaintiff in Minvielle I, they were the subject of a third-party complaint filed by IMC. Although the case was dismissed prior to ARCO, Oxy, and Pacific having made an appearance, they were nonetheless named parties to the litigation.

> Furthermore, ARCO, Oxy, and Pacific are former parties to, or successors-in-interest to the original parties to the 1961 Lease. The complaint in Minvielle II states that the defendants are joint tortfeasors and because "the negligence, acts and/or omissions of defendants have collectively contributed to plaintiff's pollution-related property damages, all defendants are solidarily liable for all damages sought in this litigation."
>
> It is clear that, as joint tortfeasors, the defendants were closely aligned and their interests were adequately represented by IMC/ Mosaic in Minvielle I. Accordingly, the requirement for identity of parties is met.[7]

Plaintiff contends that the court should not have considered the third party claims filed against ARCO, Oxy, and Pacific in Minvielle I, because they were not served and made no appearance. Plaintiff also argues that the fact that ARCO, Oxy, and Pacific were alleged to be solidarily liable with IMC does not show that the defendants were closely aligned.

Plaintiff relies on *Breaux v. Avondale Industries, Inc.*, 2002-1713 (La. App. 4 Cir. 3/12/03), 842 So.2d 1115, for the proposition that "mere solidarity" does not operate to create "virtual representation and close alignment." *Breaux* is distinguishable, however. In *Breaux*, the defendants had adverse interests, and were not considered solidarily liable. The judgment in

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[7] Rec. Doc. 87 at pps. 10-11.

question "exonerated the only party before the court, thus making it impossible to declare that party to have been solidarily liable with anyone". *Id.* at 1119. In Minvielle I, IMC/Mosaic joined as third-party defendants ARCO, Oxy, and Pacific due to the joint interests of all defendants.

Furthermore, the identity of parties in the instant case is not based solely on solidarity. The defendants in the two actions are all former parties or successors-in-interest to the 1961 lease. Plaintiff's claims against all defendants are identical and arise from the obligations allegedly created by the lease.

Additionally, plaintiff was aware at least by the time of Minvielle I that ARCO, Oxy, and Pacific had conducted operations on the land in question, and were potentially liable for the resulting contamination. Plaintiff could have asserted claims against these defendants at that time, but chose not to do so.

Finally, it is clear that IMC/Mosaic adequately represented the aligned interests of all defendants as it related to plaintiff's lack of standing under the 1961 Lease.

Considering the foregoing, the September 6, 2007 ruling finding that the there was an identity of parties in Minvielle I and II was not erroneous. The Minvielle I judgment finding that the court lacks subject matter jurisdiction is *res judicata* in this case.

Claim of standing Plaintiff argues that it has standing to sue ARCO. This does not ameliorate the

fact that there is no subject matter jurisdiction in this case. Plaintiff's standing was fully litigated in Minvielle I. The doctrine of *res judicata* precludes plaintiff's attempt to re-litigate the issue as to any party to the previous litigation, as well as parties who were closely aligned with the party in the previous litigation, such as ARCO. Because the Minvielle I judgment regarding lack of subject matter jurisdiction is *res judicata*, the court lacks subject matter jurisdiction in this case. Since dismissal is proper for lack of subject matter jurisdiction, it is not necessary to fully address plaintiff's standing argument. *Ruhrgas AG v. Marathon Oil,* 526 U.S. 574 (1999); *Alpine View Co. Ltd. v. Atlas Copco AB,* 205 F.3d 208 (5th Cir. 2000).[8]

Conclusion

Considering the foregoing, the Court's finding that *res judicata* applies to this case will not be altered. Accordingly,

IT IS ORDERED that plaintiff's motion is **DENIED**.

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[8] The undersigned also notes that this attempt by plaintiff to address this specific standing issue is improper under Rule 59, which "may not use Rule 59(e) to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the court order." *See Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004); *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir.1990).

Signed at Lafayette, Louisiana, on March 24, 2008.

/s/ Mildred E. Methvin

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE – OPELOUSAS DIVISION

FRANK C. MINVIELLE, L.L.C.	**CIVIL ACTION NO. 03-1908**
VS.	
IMC GLOBAL OPERATIONS, INC.	**MAGISTRATE JUDGE METHVIN BY CONSENT OF THE PARTIES**

MEMORANDUM OPINION –
RULING ON MOTION
(Rec. Doc. 108)

(Filed Jan. 12, 2005)

Before the court is plaintiff's Memorandum in Support of the Motion for Reconsideration and/or for New Trial seeking reconsideration of the undersigned's October 19, 2004 ruling dismissing plaintiff's claims based on lack of standing. On November 4, 2004, the Motion for Reconsideration was granted and additional briefing was ordered. Plaintiff filed a supplemental memorandum in support and defendant filed an opposition.[1]

Issues Presented

Plaintiff seeks an order vacating the Court's judgment dismissing plaintiff's claims for lack of

[1] Rec. Doc. 111 and 112.

standing to bring contractual and tort claims arising from defendant's alleged contamination of property. Plaintiff alleges it has standing to bring the claims because actions for restoration of property once burdened by a mineral lease are real rights which attach to the property, and that to the extent that the Act of Cash Sale was deficient, it is being amended to include the transfer of property rights to plaintiff.

Background[2]

On October 19, 2004, defendant's motions to dismiss and for summary judgment were granted and judgment was entered dismissing plaintiff's claims against defendant.[3] As it relates to plaintiff's lack of standing to bring contractual and tort claims, the Memorandum Opinion states:

> Plaintiff seeks damages based on IMC's breach of the 1961 lease and for IMC's tortious conduct. IMC argues that since plaintiff was not a party to the contract and the previous owners' rights under the 1961 lease were not specifically assigned to plaintiff, plaintiff lacks standing to bring the breach of contract claims. Moreover, IMC maintains that since the tortious conduct occurred prior to plaintiff owning the property, it cannot assert tort claims for damages. Plaintiff

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[2] For a detailed review of the procedural and factual background, see Rec. Doc. 105.

[3] Rec. Doc. 105.

> maintains that it has standing because it is a third party beneficiary of the contract and because tort damages can be brought regardless of the timing of the damages.
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> * * *
>
> There is no dispute that plaintiff has no direct privity of contract with IMC, nor does plaintiff allege that it obtained any assignment of rights in the the Act of Sale from the previous owners, other than warranty of title.

After an exhaustive review of the law regarding stipulations *pour autri* and standing to bring tort claims arising from damage to property, the Court found that plaintiff did not have standing to bring contractual or tort claims.

Legal Analysis

The Federal Rules of Civil Procedure do not recognize a motion to reconsider *in haec verba*. *See Lavespere v. Niagara Mach. & Tool Works. Inc.*, 910 F.2d 167, 173 (5th Cir.1990), *abrogated on other grounds by Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 n. 14 (5th Cir.1994). The Fifth Circuit has held that a motion to reconsider a dispositive pretrial motion may be classified under either Rule 59 or Rule 60, depending upon the time of filing. *Id.* If the motion is filed within ten days of the court's judgment, a motion for reconsideration is treated as a Rule 59(e) motion "to alter or amend" the judgment. *Id.* If filed

more than ten days after the judgment, a motion for reconsideration falls under Rule 60(b) as a motion for "relief from judgment." Here, plaintiff filed the motion for reconsideration less than ten days after this Court entered its judgment.[4] (Accordingly, the Court analyzes plaintiff's motion under Rule 59(e).

The district court has considerable discretion to grant or deny a motion under Rule 59(e). *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.,* 6 F.3d 350, 355 (5th Cir.1993); *Lavespere,* 910 F.2d at 174. The court must "strike the proper balance between the need for finality and the need to render a just decision on the basis of all the facts." *Bohlin,* 6 F.3d at 355. It is well established that a party may not use Rule 59(e) to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the court order. See *Simon v. United States,* 891 F.2d 1154, 1159 (5th Cir.1990); *Louis Dreyfous Corp. v. McShares, Inc.,* 1990 WL 3916, at *1 (E.D.La. Jan. 17, 1990) ("Relitigation of previously decided issues is not favored, particularly when no newly discovered evidence or other compelling reason exists.").

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[4] Judgment was entered October 19, 2004 (Rec. Doc. 105). According to Fed R. Civ. Proc. Rule 6, the day of the judgment and weekends are not included in computing time delays that are less than ten days. Accordingly, the motion filed on November 2, 2004 was filed within ten days of judgment.

Standing to enforce restoration obligation

Plaintiff asserts that defendant had an obligation under the Mineral Code, La. R.S. 31:1 *et seq*, to restore the property, and that plaintiff has standing to enforce that obligation. In the original ruling, the court found that since plaintiff was not assigned the right to enforce the obligations of the mineral lease, plaintiff did not have standing to bring the claims. Plaintiff maintains that since mineral leases are classified as real rights, they attach to the land and there was no need for a particular assignment of rights to plaintiff in order for plaintiff to have standing to bring suit.

Plaintiff is correct that the Mineral Code imposes an obligation on a mineral lessee to restore the leased property. The Louisiana Supreme Court and the Third Circuit Court of Appeals of Louisiana have recognized the contractual duty of a mineral lessee to restore the surface upon completion of operations. *See Caskey v. Kelly Oil Company,* 737 So.2d 1257 (La.1999) and *Trinidad Petroleum Corporation v. Pioneer Natural Gas Company,* 416 So.2d 290 (3rd Cir.1982). In *Trinidad*, the court held that an implied obligation of a mineral lessee to restore the surface when operations are completed is read into every mineral lease.

This, however, is not dispositive of the issue before this court. Regardless of whether or not an obligation existed, plaintiff must have standing to bring the action to enforce the obligation. Plaintiff maintains that since a mineral lease is a real right, the

obligations attach to the land, and therefore, the owner of the land has standing to bring action against the mineral lessee, despite the lack of privity of contract between plaintiff and defendant.[5]

The original ruling characterized plaintiff's action in the case at bar as a personal right, which did not attach to the property. Although, Louisiana R.S. 31:16 provides that a mineral lease, as a mineral right, is a real right, a review of the Mineral Code and the jurisprudence shows that it is not purely a real right that automatically attaches to the property, and therefore, the result of the original ruling was correct. In *Sketoe v. Exxon Co.*, 188 F.3d 596, 600-601 (5th Cir.1999), the court noted the dual nature of mineral leases, concluding that the mineral lease gives rise to a limited personal servitude, which is a real right:

> The Louisiana mineral lease includes features that are characteristic of both contracts and rights in property. *See id.* § 31:16 cmt. (noting that the mineral lease is "a hybrid institution"); *see generally* 1A W.L. SUMMERS, THE LAW OF OIL AND GAS § 167 (2d ed. 1954 & Supp.1999); Martin & Yeates, *supra*, at 823-26. For instance, we interpret the terms of the lease agreement as we

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[5] Real rights and obligations transfer from the seller to the buyer without any special provision. La.Civ.Code art. 1763. Personal rights, however, do not transfer in the absence of a special assignment of rights to the buyer. La.Civ.Code art. 1764.

> would any other lease. *See* La.Rev.Stat. Ann. § 31:2; *Massie v. Inexco Oil Co.*, 798 F.2d 777, 779 (5th Cir.1986). Indeed, the lease itself is a "contract." La.Rev.Stat. Ann. § 31:114. As such, it does not create an unlimited mineral servitude, and Louisiana's liberative prescription for ten years nonuse therefore does not apply. *See Reagan v. Murphy*, 235 La. 529, 105 So.2d 210, 215 (La.1958). On the other hand, as an "incorporeal immovable" *601 a mineral lease carries "real rights" and is "subject to the laws of registry." *See* La.Rev.Stat. Ann. §§ 31:16,:18; *St. Charles Land Trust v. St. Amant*, 253 La. 243, 217 So.2d 385, 390 (La.1968) ("Under Louisiana law, the mineral leases and servitudes held by the trustees are immovable property."). Strictly speaking, the mineral lease creates a kind of servitude called a "limited personal servitude." *See* 3 a.N. Yiannopoulis, Louisiana Civil Law Treatise: Personal Servitudes § 223, at 450 (3d ed.1989). "Limited personal servitudes are real rights that confer on a person limited advantages of use or enjoyment over an immovable[, *i.e.*, realty,] belonging to another person." *Id.* at 448-49.

Thus, it is in the nature of a limited personal servitude that the mineral lease is a real right. The limited personal servitude is explained in the Comments to La. C.C. Art. 639 as constituting "an intermediary category between personal and predial servitudes. Like usufruct and habitation, they are charges on things in favor of a person rather than an estate, like predial servitudes, they are necessarily charges on an

immovable belonging to another person and are confined to certain advantages of use or enjoyment." Although a right of use, i.e., a personal servitude, is a real right, it is one granted in favor of a person rather than an estate, and therefore it does not pass with the property upon sale of the property. *Sustainable Forests, L.L.C. v. Harrison,* 846 So.2d 123, 1284 (La.App. 2 Cir. 5/22/03). A predial servitude, however, is created to benefit an estate, and therefore, is inseparable from the estate and passes with it upon sale. La. C.C. Art. 650.

In the case of a mineral lease, the Mineral Code designates the right as a real one in order to protect the mineral lessee from losing his rights if the land is sold during the existence of the lease. This conclusion is apparent in the reasoning behind La.R.S. 31:16, which are illustrated in the Comments stating:

> All things considered, the lease has the major characteristics of a real right: the mineral lessee may follow the land, regardless of transfers of ownership; the mineral lessee may assert his rights against the world just as the proprietor of any other real right; he may enjoy directly and draw from the land a part of its economic advantages by appropriating a wasting asset; he has certain rights of preference; and he holds a right that is in reality susceptible of a type of possession through exercise.

The fact that the real right created is the right held by the lessee, is specifically noted in the Comments to La.R.S. 31:154, "The mineral lease, though it creates a real right *in the hands of the lessee* is still an elaborate contractual relationship." Accordingly, the mineral lease gives real rights to the lessee, but the Mineral Code is void of any indication that it creates real rights in favor of the lessor. This is accounted for in the Comments to La.R.S. 31:16, which note:

> It is true that there are certain distinctions from the normal real right which give the mineral lease markings of kinship to personal rights. Not all obligations created by the lease are binding on a subsequent owner of the land. However, these distinguishing marks are susceptible of recognition and are dealt with appropriately in the articles of this code governing mineral leases. The basic purpose of this article is to recognize that insofar as the mineral lease transfers both operating rights and rights to production it is a real right and not a mere personal contract.

Further, the jurisprudence does not indicate that a subsequent landowner has standing to sue a former mineral lessee based on the status of the mineral lease as a mineral right.[6] Moreover, the cases which

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[6] The lone case cited by plaintiff is factually distinguishable in that in *Magnolia Coal Terminal v. Phillips Oil Co.*, 576 So. 2d 475 (La. 1991) the landowner purchased the land while the

(Continued on following page)

do involve the issue presented herein, i.e., whether a subsequent landowner has standing to bring suit based on the expired mineral lease, require the subsequent landowner to some form of privity of contract, assignment of rights, or be the beneficiary of a stipulation *pour autri*. *Hazelwood Farm, Inc. v. Liberty Oil and Gas Corp.*, 790 So.2d 93, 100-101 (La.App. 3rd Cir. 2001) (subsequent landowner had standing to bring claims as a beneficiary of a stipulation *pour autri*); *Hargroder v. Columbia Gulf Transmission Co.*, 290 So.2d 874, 876 (La. 1974) (stipulation *pour autri*). As stated in the original ruling, "There is no dispute that plaintiff has no direct privity of contract with IMC, nor does plaintiff allege that it obtained any assignment of rights in the Act of Sale from the previous owners, other than warranty of title."[7] Plaintiff now, after the Court's ruling, claims that the parties to the Act of Sale intended to assign rights to plaintiff, and therefore, the Act of Sale will be amended to so state. Plaintiff has not provided a copy of the Amended Act of Sale, nor is there any indication that such an amendment will be allowed by the state court.

Considering the foregoing, the Court's finding that plaintiff does not have standing to bring contractual or tort claims will not be altered. Accordingly,

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mineral lease was still in existence. Here, on the other hand, the lease had expired and was no longer in effect when plaintiff purchased the land. .

[7] Rec. Doc. 105 at p. 17.

IT IS ORDERED plaintiff's request to vacate the October 19, 2004 ruling in favor of defendant is **DENIED**.

Signed at Lafayette, Louisiana on January 12, 2005.

/s/ Mildred E. Methvin

Mildred E. Methvin
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

FRANK C. MINVIELLE, L.L.C.	**CIVIL ACTION NO. 03-1908**
VS.	
IMC GLOBAL OPERATIONS, INC. TRANSOK INC. ENCANA MIDSTREAM, INC. ESTIS WELL SERVICE, L.L.C.	**MAGISTRATE JUDGE METHVIN BY CONSENT OF THE PARTIES**

MEMORANDUM OPINION – RULING ON MOTIONS
(Rec. Docs. 19 and 89)

(Filed Oct. 19, 2004)

Before the court are a number of motions to dismiss filed by defendant IMC Global Operations, Inc. ("IMC").[1] Plaintiff, Frank C. Minvielle, L.L.C. filed an opposition and IMC filed a reply.[2] Plaintiff submitted additional affidavits and defendant filed a

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[1] The motion is styled as if mover were McMoRan Exploration Company rather than defendant IMC. As the court observed in its ruling on the motion to remand, McMoRan has undertaken the defense of IMC in this suit, and its motion will be deemed on behalf of IMC. Encana also filed a motion to dismiss (Rec. Doc. 16), however, at oral argument held July 22, 2004, plaintiff's counsel advised that plaintiff was going to voluntarily dismiss Encana with prejudice, rendering Encana's motion moot. An order dismissing Encanca was issued August 16, 2004. Rec. Doc. 94.

[2] Rec. Doc. 69, 72, and 73.

motion to strike a portion of the affidavits.[3] Oral argument was held on July 22, 2004.[4]

Procedural Background

Plaintiff, a limited liability company, filed suit on August 27, 2003, in the 16th Judicial District Court alleging that it owns real property and oil and gas leases in Iberia Parish, Louisiana, which have been "contaminated or otherwise damaged by defendants' oil and gas exploration and production activities."[5] Plaintiff named as defendants IMC, Encana Midstream, Inc., Estis Well Service, L.L.C., and Transok, Inc. The case was removed to federal on October 15, 2003 pursuant to diversity jurisdiction under 28 U.S.C. § 1332. Only one defendant remains in the case at this juncture: IMC.[6]

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[3] Rec. Doc. 89.

[4] At oral argument, the court deferred ruling on the motion for summary judgment based on prescription; and on the Rule 12(b)(7) motion to dismiss for failure to join parties who retained a ½% mineral interest in the property; for lack of standing, and for failure to state a claim for attorney's fees.

[5] *See* Petition for Damages, Rec. Doc. 1, Paragraphs 1 and 3.

[6] On February 2, 2002, Estis Well Service, L.L.C. was dismissed based on fraudulent joinder (Rec. Doc. 55). Defendant Transok, Inc., was dismissed on February 20, 2004 for plaintiff's failure to prosecute (Rec. Doc. 65). Finally, Encana was dismissed with prejudice on plaintiff's motion (Rec. Doc. 94).

Factual Background

The record shows as follows: On September 28, 1961, Juliet Bourgeois Delcambre, a previous owner of the land at issue, entered into an Oil, Gas and Mineral Lease (hereinafter referred to as the "1961 lease") with The Atlantic Refining Company ("ARCO") for the purposes of exploring and possibly drilling for oil on the property.[7] ARCO subleased the mineral rights to Callery Properties, Inc. on November 26, 1962.[8] Callery Properties, Inc., in turn, conveyed its interest in the lease to Petro-Lewis Funds, Inc. on November 26, 1974.[9] Petro-Lewis conducted operations on the property and on December 24, 1977 filed a "Plug and Abandon Report" related to the Delcambre #1 Well (well serial no. 105992).[10] Plaintiff alleges that Petro-Lewis breached the contract and contaminated the property during its operations. IMC is the successor of Petro-Lewis.

Plaintiff's predecessor, Minvielle & Segura, L.L.C. purchased the land in 1998 by Act of Cash Sale.[11] On November 30, 2001, Frank C. Minvielle

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[7] Attachment to Rec. Doc. 69. On January 10, 1963, Juliet Delcambre Cowan, daughter of Juliet Bourgeois Delcambre, ratified the 1961 lease. *See* "Act of Ratification," attachment to Rec. Doc. 69.

[8] "Sublease of Oil, Gas, and Mineral Leases," attachment to Rec. Doc. 69.

[9] "Conveyance," attachment to Rec. Doc. 69.

[10] "Plug and Abandon Report," attachment to Rec. Doc. 41.

[11] Exhibit 8 to Rec. Doc. 41.

acquired all ownership of Minvielle & Segura, L.L.C., and shortly thereafter changed its name to Frank C. Minvielle, L.L.C., plaintiff in this action.[12]

Motions Presented

IMC filed the following motions:

(A) Rule 12(b)(1) Motion Requesting Deference to the Primary Concurrent Jurisdiction of the Louisiana Office of Conservation ("LOC") and the Louisiana Department of Environmental Quality ("DEQ");

(B) Rule 12(b)(1) and/or 12(b)(6) motion to dismiss premature claims;

(C) Rule 12(e) motion for more definite statement;

(D) Rule 12(b)(3) motion to dismiss for improper venue;

(E) Motion for compliance with Rule 20 and 21 regarding improper joinder;

(F) Rule 12(b)(7) motion dismiss for failure to join indispensable parties;

(G) Rule 12(b)(6) motion to dismiss for failure to state a claim for lack of

[12] Rec. Doc. 77

standing, nonrecoverable damages, and prescription.[13]

On June 2, 2004, the 12(b)(6) motions (Paragraph (G) above) were converted to motions for summary judgment since their disposition required reference to documents outside of the complaint. The parties were allowed ten days to submit additional information to be considered in connection with the motion for summary judgment.[14] On June 14, 2004, plaintiff submitted the affidavit of Frank Minvielle, owner of plaintiff Frank C. Minvielle, L.L.C. Plaintiff subsequently filed the affidavits of Juliet and Finis Cowan, regarding the previous owners' knowledge of the condition of the land at issue.[15] Defendant filed a motion to strike the affidavits, maintaining that portions of the affidavits were not based on the personal knowledge of the affiants.[16] Plaintiff filed an opposition to the motion to strike and the parties filed supplemental briefs regarding prescription and indispensable parties.[17]

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[13] Rec. Doc. 19.

[14] On June 14, 2004, plaintiff submitted the affidavit of Frank Minvielle, owner of plaintiff Frank C. Minvielle, L.L.C. Plaintiff subsequently filed the affidavits of Juliet and Finis Cowan, regarding the previous owners' knowledge of the condition of the land at issue. The parties filed supplemental briefs regarding prescription.

[15] Rec. Doc. 86.

[16] Rec. Doc. 89.

[17] Rec. Docs. 90, 92, 93, 96.

Analysis

The district court, sitting in diversity jurisdiction, must apply the substantive law of Louisiana, while employing Federal procedural rules. *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). In the absence of a valid Federal Civil Rule addressing the point, the court must determine whether a particular rule is procedural or substantive by considering the "twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer,* 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965).

(A) Rule 12(b)(1) motion for deference to the primary concurrent jurisdiction

Plaintiff seeks damages for IMC's disposal, discharge, and storage of highly toxic chemicals into plaintiff's property. Plaintiff also seeks funds to conduct a scientific analysis of the extent and nature of the contamination, the costs to restore the property, punitive damages, and attorneys' fees. IMC argues that all of the claims are subject to the primary concurrent jurisdiction of the Louisiana Office of Conservation ("LOC") and the Louisiana Department of Environmental Quality ("DEQ"), and that this court should allow those agencies to address the environmental remediation issues prior to judicial consideration of liability and damage issues.

Louisiana Revised Statute 30:1(D) provides that the LOC has jurisdiction over claims regarding: "the disposal of any waste product into the subsurface by means of a disposal well and the regulation of all surface and storage waste facilities incidental to oil and gas exploration and production, shall be within the jurisdiction of the department." The LOC also has jurisdiction over issues regarding surface and storage waste facilities incidental to oil and gas exploration and production and abandoned oil and gas wells. La. R.S. 30:4(C). The DEQ has jurisdiction over remedial action plans and has set forth a process by which remediation plans are approved and enforceable. La.R.S. 30:2286.1.

Under Louisiana law, the deference to the commissioner for an initial decision on matters within the expertise of the LOC, which is contemplated by the doctrine of primary jurisdiction, is a matter within the sound discretion of the trial court. *Magnolia Coal Terminal v. Phillips Oil Co.*, 576 So.2d 475, 489 (La. 1991). The two major considerations underlying the doctrine are the need for uniformity in various areas of regulated industry, and the special administrative expertise attributable to agencies due to their intimate working associations with industries they regulate. *South-West Utilities v. S. Cent. Bell Tel.*, 339 So.2d 425 (La.1976). Louisiana's doctrine of primary jurisdiction is substantive and it requires the federal courts to exercise discretion as if it were a Louisiana state court. *Mills v. Davis Oil Co.*, 11 F.3d 1298, 1304-1304 (5th Cir. 1994).

Landowners in Louisiana have no duty to seek relief from an administrative agency before filing suit against an oil company. *Corbello v. Iowa Production,* 850 So.2d 686 (La. 2003). Plaintiff's action for damage to its property is a matter of private law. *Magnolia Coal Terminal v. Phillips Oil Co.,* 576 So.2d 475, 483 (La. 1991). In *Magnolia Coal,* the Louisiana Supreme Court upheld a trial court's decision, in deciding a remediation issue, refusing to defer to the Commissioner of Conservation as a matter of primary jurisdiction. The court stated that "damages from soil pollution are within the conventional knowledge and expertise of a trier of fact and the court of appeal erred in deciding that the plaintiff's damages cannot be fixed until the commissioner of conservation holds a new hearing." *Magnolia Coal,* 576 So.2d at 484.

Considering the applicable law, and the fact that plaintiff opposes it, the court concludes that preliminary submission of the claims to the LOC and DEQ is not necessary. Accordingly, the Rule 12(b)(1) motion for deference to the primary concurrent jurisdiction of the LOC and DEQ is **DENIED.**

(B) and (C): Motion to dismiss premature claims, or for more definite statement

1. Prematurity involving LOC and DEQ

IMC argues that plaintiff's claims are premature because plaintiff has not sought review with the LOC or DEQ, and therefore has failed to exhaust the administrative remedies. As discussed above, exhaustion

of administrative remedies is not necessary. As discussed in *Corbello, supra,* landowners have no duty to seek relief from an administrative agency before filing suit against an oil company.

IMC asserts that claims under the Conservation Act for contamination of "usable ground water" must be made with the LOC and DEQ, pursuant to La. R.S. 30:1 and 30:2015.1 (requiring notification of DEQ in certain cases). Those statutes are inapplicable. Plaintiff has specifically stated that it does not seek redress for public issues, but instead has limited its claims to private causes of action. Louisiana Revised Statute 30:1 requires exhaustion prior to judicial review for claims by "a person aggrieved" by a law, rule, regulation or order made by the assistant secretary of the office of conservation. Plaintiff has not asserted that it has been aggrieved by an order of the LOC or DEQ, and is therefore not limited to a claim under La. R.S. 30:1.[18]

Nor is La.R.S. 30:14 applicable. The latter statute authorizes the Commissioner of Conservation to

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[18] La R.S. 30:1 provides:

> A person who is aggrieved by any law of this state with respect to conservation of oil or gas, or both, or by a provision of this Chapter, or by a rule, regulation, or order made by the assistant secretary of the office of conservation hereunder, or by an act done or threatened hereunder, and who has exhausted his administrative remedy, may obtain court review by a suit for injunction or judicial review against the assistant secretary as defendant.

enjoin conduct in violation of state laws when "ongoing or threatened" actions violate conservation laws of the state. Plaintiff's claims are for purely private matters relating solely to the actions of the defendant oil companies. Plaintiff has specifically excluded any claims for contamination of usable ground water and has otherwise avoided claims that trigger involvement by the Commissioner of Conservation. Accordingly, IMC's attempt to require administrative review by this landowner is without merit, and the motion to dismiss for prematurity is **DENIED**.[19]

2. *Prematurity under leases*

IMC contends that plaintiff was required to give defendants written notice of the alleged breach of contract and request that defendants correct the breach prior to filing this suit. IMC asserts that plaintiff's complaint is vague and omits specific facts identifying which leases have been allegedly breached

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[19] To the extent that plaintiff's complaint does mention in paragraphs 13, 16, 25, and 26 that defendant's activities have resulted in contamination of ground water, the court deems these references merely factual allegations. Since plaintiff specifically, in paragraph 31, asserts that it is not seeking damages for contamination or remediation costs for usable ground water, no such damages are recoverable due to the exclusion thereof by the complaint. In the event that plaintiff were to claim damages for contamination or remediation costs of usable ground water, La. R.S. 30:2015.1, requiring notification of DEQ, must be followed prior to assertion of any such claims.

by which defendant, the terms of the leases, the parties thereto, and the subject lands. IMC reasons that some of the leases at issue may not have been terminated yet, and therefore the present claims are premature.

A review of Exhibit "C" to plaintiff's opposition memorandum shows that IMC's predecessor, Petro-Lewis Funds, Inc. was involved with a lease that resulted in work done on plaintiff's land. Although plaintiff failed to specify, in its pleadings, the subject tract of land and whether the lease had expired, plaintiff's counsel addressed the issue at oral argument. The Petro-Lewis lease involved the Delcambre Well No. 1, which was plugged and abandoned in 1977. By its own terms, the lease expired 90 days after production ceased. IMC conceded that the lease expired in 1977. Thus, the motion to dismiss for prematurity under the lease is **DENIED.**

(D) Rule 12(b)(3) motion to dismiss for improper venue

IMC maintains that:

> To the extent that the plaintiff's claims must be brought against the LOC pursuant to La. R.S. 30:12(A)(2) as discussed in the motion to dismiss for prematurity raised above, the 19th Judicial District Court (and therefore the U.S. District Court for the Middle District of Louisiana) is the court of proper

venue for the claims raised by plaintiff's Petition.

As discussed above, IMC's motion to dismiss for prematurity regarding the necessity to file suit against the Commissioner of Conservation is without merit. Accordingly, the motion to dismiss for lack of venue based on the same arguments is **DENIED**.

(E) Motion for compliance with Rule 20 and 21 regarding improper joinder

IMC maintains that plaintiff improperly joined the defendants in this action. Since all other defendants have now been dismissed, this motion is **DENIED** as moot.

(F) Rule 12(b)(7) motion dismiss for failure to join indispensable parties

IMC argues that there may be other parties which need to be added, either as defendants or plaintiffs. Plaintiff argues that there are no other parties which need to be joined.

At oral argument, the court noted that the sellers retained a ½ percent mineral interest in the land sold to plaintiff. The Act of Cash Sale states:

> Sellers reserve and retain unto themselves, their heirs, successors and assigns, an undivided ½ [percent] of all oil, gas, and other minerals, including sulphur, in, on and under the aforedescribed property with the

> right and authority to exercise all necessary means for the prospecting, exploiting, producing and development of the minerals, including all rights of access to and use of the surface of the land as may be necessary or incident to this reservation.[20]

Rule 19(a) F.R.Civ. P. states that parties are necessary to an action if: "(1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest."

The Cowans do not own the land in question. The record indicates they are aware of this action and have not attempted to state an interest, nor have any other indispensable parties been identified. The motion to dismiss for failure to join necessary parties is therefore **DENIED**.

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[20] Exhibit 8 to Rec. Doc. 41.

(G) Rule 12(b)(6) Motion to Dismiss - Converted to Motion for Summary Judgment

IMC filed a motion to dismiss for failure to state a claim. Since the parties filed matters outside of the pleadings which must be considered in order to determine the motion, the court notified the parties that the motion would be considered a motion for summary judgment under Rule 56. F. R. C.P. 12(b). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P.56. An issue is material if its resolution could affect the outcome of the action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In deciding whether a fact issue has been created, the court must view the facts and the inferences in the light most favorable to the nonmoving party. *Olabisiomotosho v. City of Houston*, 185 F.3d 521, 525 (5th Cir.1999).

1. Prescription

a. Contra Non Valentum

Plaintiff concedes that the complaint was filed over twenty years after the alleged breach of contract and tortious conduct by defendants. Considering that tort claims prescribe one year after the date of the alleged tortious conduct, and that contractual claims

prescribe ten years after the alleged breach, the claims arising from defendants' actions on plaintiff's property were prescribed on the face of the petition. Accordingly, the burden to establish an exception to the rule of prescription lies with plaintiff. *Terrebonne Parish School Bd. v. Mobil Oil Corp.*, 310 F.3d 870, 885-886 (5th Cir. 2002). The plaintiff is required to adduce evidence sufficient to raise a genuine issue of material fact regarding its claim of an exception from prescription. Mere allegation or innuendo is insufficient.

Plaintiff relies on the theory of *contra non valentum* to avoid prescription barring the claims in this case. According to this theory, prescription does not begin to run until "a plaintiff either knew or should have known of a cause of action, even if that knowledge does not occur until long after the wrongful conduct at issue has occurred." *Simmons v. Templeton,* 723 So.2d 1009, 1012 (La.App. 4 Cir. 11/10/98). Prescription runs from the time that the plaintiff has actual or constructive knowledge of the act, which has been defined as "the time at which the plaintiff has information sufficient to excite attention and prompt further inquiry." *National Council on Compensation Ins. v. Quixx Temporary Serv., Inc.*, 665 So.2d 120, 124 (La.App. 4 Cir. 11/16/95). Thus, prescription does not begin to run at the first indication that the plaintiff may have suffered harm, but rather it begins to run "when plaintiff has reasonable basis to pursue claim against specific defendant." *Jordan v. Employee Transfer Corp.*, 509

So.2d 420, 424 (La.1987). The heart of the inquiry into constructive knowledge is the reasonableness of plaintiff's inaction. *Id.*

Plaintiff submitted the affidavit of Frank Minvielle, owner of plaintiff Frank C. Minvielle, L.L.C., which states that he did not have knowledge of a claim or reason to suspect that a claim existed until August 2003, when a geologist issued a report discussing possible contamination of plaintiff's property.

IMC does not contest that plaintiff did not have knowledge regarding the alleged contamination until just prior to the filing of suit. Plaintiff did not purchase the land until 1998, well after the alleged tortious conduct occurred. However, the claims may be prescribed if the previous owners of the land knew or should have known of the possible claims. If they did not, then under the doctrine of *contra non valentum,* prescription only began to run when plaintiff learned of the potential claims.

In response to the order setting oral argument, plaintiff submitted the affidavits of Finis E. Cowan, Jr. and Juliet D. Cowan. The Cowans are married and Mrs. Cowan's mother, Mrs. Juliet Delcambre, owned the land at issue until her death in 1988, at which time the land passed to Mrs. Cowan and her children.[21] Mr. Cowan explained that in 1982,

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[21] Rec. Doc. 86.

PanCanadian Petroleum, Encana's predecessor, paid Mrs. Delcambre $21,000.00 for possible contamination from its operations.[22] With regard to IMC's predecessor Petro-Lewis's oilfield operations, Mr. Cowan states, "I have never had any information that would lead me to know or believe that there was any contamination problems at the Petro Lewis site." Mrs. Cowan states, "I have reviewed the above affidavit and discussed it with my husband. To the best of my knowledge the statements contained in his affidavit are true and correct."[23]

IMC argues that the affidavits of the Cowans are insufficient to defeat the motion for summary judgment.[24] IMC maintains that the Cowans' affidavits were not based on personal knowledge regarding what the pre-1988 owners knew. Mrs. Cowan inherited the land from her mother in 1988. Additionally, IMC argues that since the Cowans' affidavits contain language evidencing that they did not know where the Petro Lewis well was located, they could not provide information based upon personal knowledge regarding possible contamination at the site.

The court concludes that the affidavits of the Cowens establish that prior to selling the property to plaintiff, they did not know of any contamination, nor was there any indication that the property may have

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[22] Rec. Doc. 86.

[23] Rec. Doc. 86

[24] Rec. Doc. 89.

been contaminated by Petro-Lewis. IMC's argument that the Cowans did not have personal knowledge regarding the facts relating to the Petro-Lewis well is unpersuasive. The Cowans attest that they had no information regarding possible contamination or claims against Petro-Lewis, and no reason to believe that there was any contamination or other problems with the land prior to it being sold to plaintiff. Their lack of knowledge is explained by their further assertions that they were far removed from the operations and did not even know the exact location of the well. The Cowans state that they relied upon the oilfield companies to perform their work according to the leases. Thus, absent some affirmative communication from a company, such as PanCanadian's statement to the landowners that it had contaminated the site, there was no reason to believe that the companies operating on the land were doing so in a deficient manner. Moreover, since the owner of the land prior to 1988, Mrs. Delcambre, is deceased, it would be virtually impossible for plaintiff to establish Mrs. Delcambre's knowledge regarding the land without relying upon the affidavits of the Cowans, from whom Mrs. Delcambre sought advice on issues concerning the land. It is clear that the Cowans did not know of contamination, nor do they have reason to believe that Mrs. Delcambre had any such knowledge. IMC concedes that the Cowans are testifying truthfully in their affidavits.

Considering the foregoing, the court concludes that no one had reason to believe that there was a problem with the land prior to the 2003 geologist's report indicating possible contamination. The doctrine of *contra non valentum* therefore suspended the running of prescription until plaintiff had knowledge of the claims shortly before filing suit. IMC's motion for summary judgment is therefore **DENIED**. Additionally, IMC's motion to strike the affidavits of the Cowans is **DENIED**.

b. Continuing tort

The doctrine of continuing tort presents an exception to the one-year prescriptive period. "A continuing tort is occasioned by [the continual] unlawful acts, not the continuation of the ill effects of an original, wrongful act." *Crump v. Sabine River Authority,* 737 So.2d 720, 728 (La.6/29/99).[25] Addressing the requirement that there be continuous conduct by the defendant, the Louisiana Supreme Court stated that "[t]he continuous conduct contemplated in a continuing tort must be tortious and must be the operating cause of the injury." *Id.* at 729 n. 7. In *Crump,* the Louisiana Supreme Court rejected the

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[25] Although the decision regarding *contra non valentum* defeats the motion for summary judgment on prescription at this time, the argument concerning the continuing tort doctrine will be addressed since there is a possibility that a fact finder will find that the doctrine of *contra non valentum* is inapplicable to the case.

contention that a continuing breach of duty could consist of a defendant's failure to remedy the harm caused by the initial tortious conduct, stating that "the breach of the duty to right the wrong and make the plaintiff whole simply cannot be a continuing wrong which suspends the running of prescription, as that is the purpose of any lawsuit and the obligation of every tortfeasor." *Id.* at 729.

The Louisiana Supreme Court summarized the doctrine of continuing tort as it applies in Louisiana property law cases as follows:

> When a defendant's damage-causing act is completed, the existence of continuing damages to the plaintiff, even progressively worsening damages, does not present successive causes of action accruing because of a continuing tort. *Derbofen v. T.L. James & Co.*, 355 So.2d 963 (La.App. 4th Cir.1977), *writs denied*, 357 So.2d 1156, 1168(La.), *cert. denied*, *886 439 U.S. 911, 99 S.Ct. 280, 58 L.Ed.2d 257 (1978).

In re Moses, 788 So.2d 1173, 1183 (La. 2001). The practical rule adopted by Louisiana courts in property damage cases is that prescription begins to run when the continuous tortious conduct is abated.

The case law distinguishes between ongoing causes and tortious conduct that has ceased. In cases such as *Patout*, where landfill waste was deposited onto plaintiff's property via trespass, and *South Central Bell*, where gas tanks continued to leak, the ongoing cause was the failure of the defendants to

remove the damage causing structure. *Estate of Patout v. City of New Iberia,* 708 So.2d 526 (La. App. 3 Cir. 3/6/98); *South Central Bell Telephone Co. v. Texaco, Inc.,* 418 So. 2d 531 (La. 1982). In *South Central Bell,* leaking underground storage tanks caused continuous damages to plaintiff's underground telephone wires. Because both the conduct – the leaking – and the damages continued, the tort was held to be a continuous.

In *Mouton v. State of Louisiana,* 525 So.2d 1136 (La.App. 1st Cir.1988), however, disposal of waste in the ground was not a continuing tort. The court held that the tortious conduct was the dumping of waste onto plaintiff's property and, since it occurred beyond the one year prescriptive period, the action had prescribed. Similarly, in *Badalamenti v. Chevron Chemical Co.,* 1995 WL 386868, *2 (E.D.La.), the court found that the tortious conduct at issue was the disposal of waste onto plaintiff's property. The operating cause of plaintiff's injury did not continue beyond the placement of the waste in the ground, and therefore, defendant's alleged conduct did not constitute a continuing tort because there was no ongoing cause. Likewise in *Terrebonne Parish School Bd. v. Mobil Oil Corp.,* 310 F.3d 870, 885-886 (5th Cir. 2002), the Fifth Circuit upheld the district court's finding that the continuing tort doctrine was inapplicable. In *Terrebonne v. Mobil,* pursuant to a mineral lease, the defendant dredged a canal during its oil operations. After completion of the operations, the defendant left the canal intact. Plaintiff sued, 40

years later, arguing that the existence of the canal contributed to erosion of its land and the demise of the marshland habitat. The Fifth Circuit found that the unlawful conduct was not continuing because the completed well was abandoned with the canal left intact in 1959. Thus, even though the damage, i.e. the erosion, may have been continuing, the continuing tort doctrine was inapplicable because there was no continuing cause.

Here, like *Mouton,* the tortious conduct was the disposal of waste into plaintiff's property. The operating cause of plaintiff's injury was the actual disposal or storage of the oilfield waste in plaintiff's property. The conduct abated when the defendant's ceased operations, which was in excess of 20 years ago. Simply because the damages brought about by such conduct may have continued, that is insufficient to support application of the continuing tort doctrine. Accordingly, the continuing tort doctrine is inapplicable to the case at bar.

2. Lack of standing

Plaintiff seeks damages based on IMC's breach of the 1961 lease and for IMC's tortious conduct. IMC argues that since plaintiff was not a party to the contract and the previous owners' rights under the 1961 lease were not specifically assigned to plaintiff, plaintiff lacks standing to bring the breach of contract claims. Moreover, IMC maintains that since the tortious conduct occurred prior to plaintiff owning the

property, it cannot assert tort claims for damages. Plaintiff maintains that it has standing because it is a third party beneficiary of the contract and because tort damages can be brought regardless of the timing of the damages.

a. Contractual claims

Actions arising from a breach of contract or lease of property are classified as involving personal rights rather than real rights. *Prados v. South Central Bell Tel. Co.,* 329 So.2d 744, 749 (La. 1976), *citing Leonard v. Lavigne,* 245 La. 1004, 162 So.2d 341 (1964); *Harwood Oil and Mining Co. v. Black,* 240 La. 641, 124 So.2d 764 (1960) *overruled on other grounds by Salvex, Inc. v. Lewis,* 546 So.2d 1309 (La.App. 3d Cir.1989); 2 A. YIANNOPOULOS, LOUISIANA CIVIL LAW TREATISE – PROPERTY, s 95, pp. 275-278 (1st Ed. 1967). Real rights and obligations transfer from the seller to the buyer without any special provision. La.Civ.Code art. 1763. Personal rights, however, do not transfer in the absence of a special assignment of rights to the buyer. La.Civ.Code art. 1764. Official Comment (d) of article 1764 states that, "a particular successor does not acquire, without stipulation to that effect, any personal rights that his author has with respect to the thing."

There is no dispute that plaintiff has no direct privity of contract with IMC, nor does plaintiff allege that it obtained any assignment of rights in the the

Act of Sale from the previous owners, other than warranty of title. The Act of Sale provides:

> . . . Sellers, who, for the price and on the terms and conditions hereafter expressed hereby sell, assign, transfer and deliver with all legal warranties and with full substitution and subrogation in and to all the rights and actions of warranty which Sellers have or may have against all preceding owners and vendors unto . . . Purchaser.[26]

Such a subrogation clause applies only to warranty of title and does not assign personal rights for damages arising from previous leases involving the property. *Prados, supra,* 329 So.2d 744, 749 (La. 1976).

Plaintiff argues, rather, that it is a third-party beneficiary of a "stipulation *pour autri*" contained in the the contract between the earlier landowners and IMC's predecessor. LA.CIV.CODE ANN. art 1978 provides as follows:

> **Art. 1978. Stipulation for a third party**
>
> A contracting party may stipulate a benefit for a third person called a third party beneficiary.
>
> Once the third party has manifested his intention to avail himself of the benefit, the parties may not dissolve the contract by

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[26] Exhibit 8 to Rec. Doc. 41.

> mutual consent without the beneficiary's agreement.

Comment (b) to ART. 1978 states that "the beneficiary's intention to accept the benefit may be made known in any manner, even implied." Thus, by simply filing suit, plaintiff has made known its intention to accept the benefit, if it exists.

The specific language of the contract in question determines whether a stipulation *pour autrui* has been created. The Fifth Circuit has observed the necessity of clarity in any contractual provision intended to contain a stipulation *pour autrui*:.

> . . . [S]uch a promise, or a stipulation *pour autrui,* "is never presumed. Rather, the intent of the contracting parties to stipulate a benefit in favor of a third party must be made manifestly clear." *Homer Nat'l Bank v. Tri-District Dev. Corp.,* 534 So.2d 154, 156 (La.App. 3d Cir.1988), *writ denied,* 536 So.2d 1236 (La.1989). As we stated in *New Orleans Public Service, Inc. v. United Gas Pipe Line Co.,* 732 F.2d 452 (5th Cir.) *(en banc), cert. denied sub nom. Morial v. United Gas Pipe Line Co.,* 469 U.S. 1019, 105 S.Ct. 434, 83 L.Ed.2d 360 (1984):
>
> > Louisiana law is settled that for there to be a stipulation *pour autrui* there must be not only a third-party advantage, but the benefit derived from the contract by the third party may not merely be incidental to the contract. Rather, the third-party

> benefit must form the condition or consideration of the contract in order for it to be a stipulation *pour autrui*. Moreover, a stipulation *pour autrui* will be found only when the contract clearly contemplates the benefit to the third person as its condition or consideration.
>
> 732 F.2d at 467 (internal quotations and citations omitted).

Chevron U.S.A., Inc. v. Traillour Oil Co., 987 F.2d 1138, 1147 (5th Cir.1993).

Plaintiff relies on *Hazelwood Farm, Inc. v. Liberty Oil & Gas Corp.*, 790 So.2d 93 (La.App. 3rd Cir.2001), *writ denied*, 01-2115 (La.7/26/01), 794 So.2d 834, *writ denied*, 01-2303 (La./10/01), 794 So.2d 836. In *Hazelwood*, the defendant had conducted oil and gas exploration and production activities pursuant to a contract with a previous landowner. After purchasing the property, Hazelwood filed suit alleging that the defendants' activities resulted in contamination of the property. Defendant Gulf/Chevron asserted that Hazelwood was not a party to the lease and therefore could not bring an action for the breach of the lease. The court found, however, that Hazelwood was the beneficiary of a stipulation *pour autrui*. *Id.* at 100, *citing* La.Civ.Code art. 1978. The court noted that several factors are considered in determining whether a contract provides for a stipulation

pour autrui. Id. citing Andrepont v. Acadia Drilling Co., 231 So.2d 347, 351, 255 La. 347 (1969).[27] The court looked to the language in the lease, which provided that "Grantee shall be responsible for all damages caused by his operations." The court found that this language was similar to the relevant phrase in the *Andrepont* lease: "The Lessee shall be responsible for all damages caused by Lessee's operations." The latter lease had been found to create a stipulation *pour autrui,* and accordingly, the *Hazelwood* court concluded that the language in the lease must be interpreted as providing a stipulation *pour autrui* in favor of Hazelwood.

In *Andrepont supra,* the landowner allowed Andrepont to farm soybeans on a 35-acre tract in return for twenty percent of his crop. Later, the land and mineral owners of the tract executed an oil and gas lease allowing the lessee to enter the land to explore and produce oil, gas, and other minerals. The

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[27] The factors are: "(1) The existence of a legal relationship between the promisee and the third person involving an obligation owed by the promisee to the beneficiary which performance of the promise will discharge; (2) the existence of a factual relationship between the promisee and the third person, where (a) there is a possibility of future liability either personal or real on the part of the promisee to the beneficiary against which performance of the promisee (sic) will protect the former; (b) securing an advantage for the third person may beneficially affect the promisee in a material way; (c) there are ties of kinship or other circumstances indicating that a benefit by way of gratuity was intended." *Andrepont*, 231 So.2d at 351.

oil company's operations on the tract were detrimental to Andrepont's soybean crop:

> * * * [D]uring July, the oil and gas lessee entered upon the land, built a board road across Andrepont's field, dug waste pits and proceeded to drill a well in search of minerals. Construction of the road, the drill site and pits destroyed part of the crop and impaired drainage in the remainder of the soybean field. The lack of adequate drainage left water standing in the field and made it impracticable to work the crop. As a result, the remainder of Andrepont's crop was damaged by 'scalding' and excessive weeds.

Andrepont, 231 So.2d 347, 353-355. The Louisiana Supreme Court examined the lease form, which initially read, "The Lessee shall be responsible for all damages to timber and growing crops of the Lessor caused by Lessee's operations." *Id.* at 351. The phrase "to timber and growing crops of Lessor" was then deleted so that the lease read, "The Lessee shall be responsible for all damages caused by Lessee's operations." *Id.* The Court found that this language created a stipulation *pour autrui.* The court wrote:

> [Andrepont] is seeking to enforce a benefit stipulated in his favor by the landowner lessor as a condition of a commutative contract between the landowner lessor and the oil and gas lessee. Defendants, as assignees of the oil and gas lessee, are, therefore, parties to the contract in which the stipulation is a condition. . . ."

Id. at 356. The court reasoned that Andrepont had a direct right of action against the lessee to recover his damages as beneficiary of the stipulation.

In *Hargroder v. Columbia Gulf Transmission Co.*, 290 So.2d 874, 876 (La. 1974), the court found that a stipulation *pour autrui* was created by language in a servitude agreement providing that defendant "agrees to pay such damages which may arise to growing crops, timber, or fences from the construction of the [pipeline]."

An examination of the lease in question shows that the language contained therein is materially distinguishable from that presented in *Hazelwood* and *Andrepont,* and *Hargroder.* Unlike the open-ended provisions in *Hazelwood* and *Andrepont* – "the lessee shall be responsible for all damages" – the lease here contemplates damages only "to Lessor and Lessor's tenants." The relevant provision of the 1961 lease *sub judice* reads as follows:

> Lessee shall promptly pay Lessor and Lessor's tenants a reasonable sum for any damage resulting to said premises or the crops or improvements thereon which may be caused by or result from the operations of Lessee hereunder. Within ninety (90) days after the cessation of drilling operations on any well located on the leased premises, Lessee, or its successors and assigns, shall fill and level all slush pits and shall remove the drilling equipment and material used in connection therewith from the drill site and

> shall restore said drill site to substantially its prior condition, so far as can reasonably be done, as concerns any material change in the surface of such premises caused by or resulting from operations of Lessee hereunder.

Although the second sentence requiring restoration of the property seems to impose a general obligation of restoration, the provision must be read as a whole. The only provision which discusses a right to damages is limited to damages payable to "Lessor and Lessor's tenants." Under Louisiana case law, such language does not create a stipulation *pour autrui* in favor of plaintiff. In *Broussard v. Northcott Exploration Co., Inc.*, 481 So.2d 125, 127 (La. 1986), the court found that no stipulation *pour autri* was created by a clause stating, "The Lessee shall be responsible for all surface damages of the Lessor caused by the Lessee's operations" because the language was restricted to damages suffered by the lessor. The court held that the intent of the parties was key in determining whether a stipulation *pour autrui* is created. *Id.*, 481 So. 2d at 127. A later court cited *Broussard* in concluding that no stipulation *pour autrui* arises in the absence of a clear intention to benefit future surface owners:

> Even viewing the clause as a possible stipulation *pour autrui* (stipulation for benefit of a third party), the result would be the same. *Broussard v. Northcott Exploration Company, Inc.*, 481 So.2d 125 (La.1986); *Hargroder v. Columbia Gulf Transmission Co.*, 290 So.2d

> 874 (La.1974); *Andrepont v. Acadia Drilling Co., Inc.*, 255 La. 347, 231 So.2d 347 (1969). The test annunciated in *Broussard* states that "[i]n order to determine if a stipulation [pour autrui] exists, we must look to the intention of the parties at the time the mineral lease was negotiated." Since the foregoing analysis indicates no such intention to benefit future surface owners, there was no stipulation *pour autrui* in favor of plaintiffs in this case.

Ashby v. IMC Exploration Co., 506 So.2d 1193, 1196 fn.7 (La. 1987).

In *Prados, supra,* 329 So.2d at 751, a land owner granted a lease to South Central Bell Telephone Company, allowing it to erect buildings and other structures on the land. The lease required the company to remove the structures at the completion of the lease. Upon termination of the lease, South Central Bell did not remove the structures, nor did the owner require removal. Several months later, the property was sold to Prados. After acquiring the property, Prados demanded that South Central Bell remove the structures. The company refused and Prados filed suit for damages representing the cost of clearing the property. South Central Bell challenged Prados's standing to bring suit based upon a breach of a former lessee's obligation to restore the property at the termination of the lease. Noting that predial

leases[28] involve personal rights, the Louisiana Supreme Court found that the right to damages was a personal right that accrued to the lessor prior to the sale of the property to Prados. Thus, the court looked to the act of sale to determine whether the right to damages was specifically assigned by the previous owner to Prados. The act of sale stipulated:

> . . . she (Mrs. Ester Binford Prados) does by these presents, grant, bargain, sell, convey, transfer, assign and set over with full guarantee against all mortgages, liens, claims, evictions, or other encumbrances or alienations whatsoever, and with subrogations to all her rights and actions of warranty against all previous owners, and with full guarantee of title, unto JAMES L. PRADOS.

The court found that the act of sale made no reference to the expired lease, nor to the right of the seller to a restoration of the property to its original state, nor to the right of damages. The subrogation clause was directed only to actions of warranty against previous owners and did not include an assignment of the right to damages.

The court next determined that no right to damages from breach of contract could attach to the property itself, relying on the rule that "a purchaser

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[28] Louisiana civil law uses the terms "predial and personal servitude" instead of the term "easement" when classifying lands.

cannot recover from a third party for damage to the property incurred prior to the sale." *Id.* at 750, *citing Gumbel v. New Orleans Terminal Co.*, 1 So.2d 686 (1941) *overruled on other grounds Lake, Inc. v. LP&L Co.*, 330 So.2d 914 (1976); *Taylor v. New Orleans Terminal Co.*, 126 La. 420, 52 So. 562 (1910); *McCutchen v. Texas & P. Ry. Co.*, 118 La. 436, 43 So. 42 (1907); *Bradford v. Richard, et al.*, 46 La.Ann. 1530, 16 So. 487 (1894); *Clark v. Warner & Co.*, 6 La.Ann. 408 (1851). The court stated, "The general principle, we think, is that a buyer is presumed to know the overt condition of the property and to take that condition into account in agreeing to the sales price." *Id.* at 751. Accordingly, the court held that Prados did not receive the right to recover damages against the former lessee via the act of sale or by virtue of purchasing the property.

Considering the foregoing, the court concludes that plaintiff did not receive an assignment of rights from the previous owner, nor did the 1961 lease create a stipulation *pour autrui* in favor of plaintiff. Thus, plaintiff does not have standing to bring contractual claims arising from the 1961 lease. Accordingly, the motion for summary judgment based on lack of standing to bring contractual claims is **GRANTED**.

b. Tort claims

Under Louisiana jurisprudence, the owner of land at the time of the alleged damages is the person

with the real and actual interest to assert a claim for damages to the land; thus, a subsequent landowner does not have standing to assert tort claims for damage to property occurring prior to the landowner's acquisition of the land. *Gumbel v. New Orleans Terminal Co.*, 197 La. 439, 1 So.2d 686 (La.1941) *overruled on other grounds Lake, Inc. v. LP&L Co.*, 330 So.2d 914 (La. 1976); *St. Jude Medical Office Building Limited Partnership v. City Glass and Mirror*, 619 So.2d 529, 530 (La. 1993); *Dorvin Land Corp. v. Parish of Jefferson*, 469 So.2d 1011 (La. 5th Cir. 1985).

Plaintiff argues that "Louisiana law is now well settled that with regard to claims to damage to immovables, whether the damage at issue occurred prior to plaintiffs' acquisition of the subject property is immaterial."[29] In support of this proposition, plaintiff cites three cases, two of which deal with contract claims, not tort. *See Hazelwood Farm, Inc. v. Liberty Oil and Gas Corp.*, 844 So.2d 380 (La. App. 3 Cir. 2003) (plaintiff had standing to bring contract claims because it was beneficiary of a stipulation *pour autri*); *Magnolia Coal Terminal v. Phillips Oil Co.*, 576 So. 2d 475 (La. 1991) (standing not addressed as the lease was still in effect at time plaintiff purchased the land).

The third case relied upon by plaintiff is not instructive on the issue presented here. In *Hopewell*,

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[29] Rec. Doc. 69 at p. 10.

Inc. v. Mobil Oil Co., 770 So.2d 874, 875-876 (La.App. 2d Cir. 2000), defendant's predecessor had engaged in oilfield operations on the subject land pursuant to a lease.[30] Subsequently, Hopewell bought the property. Hopewell filed a petition for damages alleging that the oil and gas operations had resulted in the deposit of hazardous and toxic wastes on the property. Hopewell argued that Mobil had a duty to restore the property, and that the duty extended to a subsequent landowner. Mobil asserted an exception of no right of action, which the trial court denied. The appellate court reversed, finding that because Hopewell had purchased the land after the damages had occurred, it did not have a right of action. *Hopewell,* 770 So.2d at 879. The Louisiana Supreme Court reversed the appellate court, but its reasoning was not entirely clear. The court wrote:

> Judgment of the Court of Appeal is reversed. Judgment of the trial court denying defendant's exception of no right of action is

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[30] "In 1921, the Pugh family ancestors gave Fortuna Oil Company (Fortuna) the right to construct a casing head gas plant on the property. Fortuna already held a mineral lease on this tract. In 1922, the Pugh ancestors sold surface rights on the property to Fortuna. Oil and gas operations were conducted on the property by Fortuna. Magnolia Oil Company (Magnolia) later acquired the property from Fortuna. The casing head gas plant and several oil and gas wells were operated on the property. The tract was then conveyed back to the Pugh family in 1945 in settlement of a lawsuit with Magnolia . . . The surface rights were leased to Magnolia. The gas plant later ceased production, possibly in the 1950s." *Hopewell*, 770 So.2d at 875.

> reinstated. *Prados v. South Central Bell Telephone Company,* 329 So.2d 744 (La.1975) (on rehearing), which the Court of Appeal relied upon, involves rights arising under a lease and is distinguishable from the instant facts. Case remanded to the trial court for further proceedings.

Hopewell, Inc. v. Mobil Oil Co., 784 So.2d 653, 2000-3280 (La. 2001).

Although plaintiff characterizes the *Hopewell* decision as one of "brevity and clarity," the court agrees only with the "brevity" part. The only thing clear about the decision is that the court did not, by its brief reversal, establish a new legal principle. If that had been the court's intent, it easily could have said so in plain terms – i.e. that it was conferring standing upon subsequent landowners to assert tort claims for property damage occurring prior to their acquisition of the land. Nor did the decision alter the rule in Louisiana that the landowner at the time of the alleged damages is the person with the real and actual interest to assert a tort claim involving the property under *Gumbel* and *Dorvin.*

The law in Louisiana remains that the owner of land at the time of the alleged damages is the person with the real and actual interest to assert the claim for damages to the land. *See Gumbel v. New Orleans Terminal Co., supra* (purchaser had no right of action for damages arising from railroad tracks placed on land prior to purchase of land); *Taylor v. New Orleans Terminal Co.,* 126 La. 420, 52 So. 562 (1910)

(purchaser had no right of action for damages from railroad company for taking land which occurred prior to the purchase of the land); *McCutchen v. Texas & P. Ry. Co.,* 118 La. 436, 43 So. 42 (1907) (purchaser had no right of action for damages from railroad company for erecting right of way on land which occurred prior to the purchase of the land); *Bradford v. Richard, et al.,* 46 La.Ann. 1530, 16 So. 487 (1894) (purchaser of land had no right of action for damages arising from alleged taking of timber by defendant prior to purchase of the land); *Dorvin Land Corp. v. Parish of Jefferson,* 469 So.2d 1011 (La.App. 5th Cir.1985) (landowner did not have standing to sue parish for removal of trees and dumping of spoil where damages took place prior to owner acquiring title).

It is undisputed that plaintiff is seeking damages arising from operations which occurred prior to plaintiff's acquisition of the land. For the foregoing reasons, the court concludes that plaintiff does not have standing to bring tort claims against IMC. Accordingly, the motion for summary judgment based on lack of standing to bring tort claims is **GRANTED**.

3. Nonrecoverable damages

IMC asserts that plaintiff has no right to recover damages for mental anguish, punitive damages, or attorney's fees.

A business entity is incapable of experiencing loss of enjoyment, mental anguish, and inconvenience. *Whitehead v. American Coachworks, Inc.*, 837 So.2d 678, 682 (La.App. 1 Cir. 2002) *citing City of New Orleans v. Grand Lodge of Independent Order of Odd Fellows,* 241 So.2d 7, 10 (La.App. 4th Cir.1970). Plaintiff does not address this issue in its brief. The motion to dismiss plaintiff's claims for mental anguish damages contained in Paragraphs 24, 28, and 33 of the Complaint is therefore **GRANTED**.

Plaintiff asserts a claim for punitive damages under La. Civil Code Article 2315.3. Article 2315.3 was enacted in 1984 and was repealed in 1996. IMC argues that plaintiff's claims for punitive damages for activities occurring outside the 1984 to 1996 timeframe should be dismissed. Plaintiff does not oppose the motion, but argues only that the claim for punitive damages during this period should not be dismissed Accordingly, the motion to dismiss plaintiff's claim for punitive damages outside of the period of 1984 to 1996 is **GRANTED**.

The Complaint included a claim for attorney's fees, however, on September 7, 2004, plaintiff's counsel advised that this claim was being withdrawn.[31] This letter effectively provides notice that the motion to dismiss plaintiff's attorney's fees claim is unopposed. Accordingly, the motion to dismiss is **GRANTED** as unopposed.

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[31] Rec. Doc. 97.

Signed at Lafayette, Louisiana October 19, 2004.

/s/ M E Methvin

Mildred E. Methvin
United States Magistrate Judge
800 Lafayette St., Suite 3500
Lafayette, Louisiana 70501
(337) 593-5140 (phone)
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

FRANK C. MINVIELLE, L.L.C.	**CIVIL ACTION NO. 03-1908**
VS.	
IMC GLOBAL OPERATIONS, INC. TRANSOK INC. ENCANA MIDSTREAM, INC. ESTIS WELL SERVICE, L.L.C.	**MAGISTRATE JUDGE METHVIN BY CONSENT OF THE PARTIES**

JUDGMENT

(Filed Oct. 19, 2004)

For the reasons set forth in the Memorandum Opinion filed this date,

IT IS ORDERED that the following motions are **DENIED**:

- Rule 12(b)(1) motion for deference to the primary concurrent jurisdiction of the Louisiana Office of Conservation and the Louisiana Department of Environmental Quality;
- Rule 12(b)(1) and/or Rule 12(b)(6) motion to dismiss premature claims;
- Rule 12(e) motion for more definitive statement;
- Rule 12(b)(3) motion to dismiss for improper venue;

- Motion for compliance with Rule 20 and 21 regarding improper joinder (moot);
- Rule 12(b)(6) motion to dismiss on grounds of prescription;
- Rule 12(b)(7) motion to dismiss for failure to join necessary parties;
- Motion to strike section five of the affidavit of Finis Cowan and the affidavit of Juliet D. Cowan

IT IS FURTHER ORDERED that the following motions are **GRANTED**:

- Rule 12(b)(6) motion to dismiss (converted to a motion for summary judgment) for failure to state a contractual claim due to lack of standing;
- Rule 12(b)(6) motion to dismiss (converted to a motion for summary judgment) for failure to state a tort claim due to lack of standing;
- Rule 12(b)(6) motion to dismiss for failure to state a claim for mental anguish damages (unopposed);
- Rule 12(b)(6) motion to dismiss punitive damage claim outside the period of 1984 to 1996.
- Rule 12(b)(6) motion to dismiss for failure to state a claim for attorney's fees (unopposed)

Considering that the rulings granting the motions for summary judgment for failure to state contractual and tort claims due to lack of standing dispose of all claims, **IT IS ORDERED** that the Clerk take note that this Judgment effectively dismisses all of plaintiffs' claims.

Signed at Lafayette, Louisiana on October 19, 2004.

/s/ M E Methvin

Mildred E. Methvin
United States Magistrate Judge
800 Lafayette St., Suite 3500
Lafayette, Louisiana 70501
(337) 593-5140 (phone)
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28 U.S.C.A. § 1332 Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title –

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d)(1) In this subsection –

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which –

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of –

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2) –

(A)(i) over a class action in which –

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant –

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which –

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim –

> **(A)** concerning a covered security as defined under 16(f)(3)[1] of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)[2]) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));
>
> **(B)** that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of

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[1] So in original. Reference to "16(f)(3)" probably should be preceded by "section".

[2] So in original. Probably should be "77(p)(3)".

the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(11)(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B)(i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which –

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

(ii) This subparagraph will not apply –

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

(e) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C.A. § 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this

title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e)(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if –

> **(A)** the action could have been brought in a United States district court under section 1369 of this title; or
>
> **(B)** the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same

accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an

action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

LSA-R.S. 30:29 Remediation of oilfield sites and exploration and production sites

A. The legislature hereby finds and declares that Article IX, Section 1 of the Constitution of Louisiana mandates that the natural resources and the environment of the state, including ground water, are to be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people and further mandates that the legislature enact laws to implement this policy. It is the duty of the legislature to set forth procedures to ensure that damage to the environment is remediated to a standard that protects the public interest. To this end, this Section provides the procedure for judicial resolution of claims for environmental damage to property arising from activities subject to the jurisdiction of the Department of Natural Resources, office of conservation. The provisions of this Section shall be implemented upon receipt of timely notice as required by Paragraph (B)(1) of this Section. The provisions of this Section shall not be construed to impede or limit provisions under private contracts imposing remediation obligations in excess of the requirements of the department or limit the right of a party to a private contract to enforce any contract provision in a court of proper jurisdiction.

B. (1) Notwithstanding any law to the contrary, immediately upon the filing or amendment of any litigation or pleading making a judicial demand arising from or alleging environmental damage, the provisions of this Section shall apply and the party filing

same shall provide timely notice to the state of Louisiana through the Department of Natural Resources, commissioner of conservation and the attorney general. The litigation shall be stayed with respect to any such judicial demand until thirty days after such notice is issued and return receipt is filed with the court.

(2) The department or the attorney general, in accordance with their areas of constitutional and statutory authority and regulations adopted pursuant thereto, shall have the right to intervene in such litigation in accordance with the Louisiana Code of Civil Procedure. Nothing in this Section shall diminish the authority of the department or the attorney general to independently bring any civil or administrative enforcement action. Nor shall anything in this Section preclude the department from independently responding in a timely manner to an inquiry or request by a landowner for investigation.

(3) Any judgment or order in any litigation to which this Section applies shall be without prejudice to any independent civil or administrative action by the department or the attorney general regarding any environmental damage alleged therein. No such judgment or order in such litigation may bar the department or the attorney general pursuant to R.S. 13:4231 et seq., or otherwise from pursuing any independent civil or administrative action regarding environmental damage alleged therein, regardless of whether the department or the attorney general has intervened.

(4) No judgment or order shall be rendered granting any relief in such litigation to which this Section applies, nor shall the litigation be dismissed, until timely notice is received by the state of Louisiana as set forth in this Subsection.

C. (1) If at any time during the proceeding a party admits liability for environmental damage or the finder of fact determines that environmental damage exists and determines the party or parties who caused the damage or who are otherwise legally responsible therefor, the court shall order the party or parties who admit responsibility or whom the court finds legally responsible for the damage to develop a plan or submittal for the evaluation or remediation to applicable standards of the contamination that resulted in the environmental damage. The court shall order that the plan be developed and submitted to the department and the court within a time that the court determines is reasonable and shall allow the plaintiff or any other party at least thirty days from the date each plan or submittal was made to the department and the court to review the plan or submittal and provide to the department and the court a plan, comment, or input in response thereto. The department shall consider any plan, comment, or response provided timely by any party. The department shall submit to the court a schedule of estimated costs for review of the plans or submittals of the parties by the department and the court shall require the party admitting responsibility or the party found legally responsible by the court to deposit

in the registry of the court sufficient funds to pay the cost of the department's review of the plans or submittals. Any plan or submittal shall include an estimation of cost to implement the plan.

(2) Within sixty days from the last day on which any party may provide the department with a plan, comment, or response to a plan as provided in Paragraph (C)(1) of this Section, the department shall conduct a public hearing on the plan or plans submitted. Within sixty days of the conclusion of the hearing, the department shall approve or structure a plan based on the evidence submitted which the department determines to be the most feasible plan to evaluate or remediate the environmental damage and protect the health, safety, and welfare of the people. The department shall issue written reasons for the plan it approves or structures. On motion of the department, for good cause shown, the court may grant the department additional time, not to exceed sixty days, within which to either conduct the hearing or approve a plan with reasons.

(3) The department shall use and apply the applicable standards in approving or structuring a plan that the department determines to be the most feasible plan to evaluate or remediate the environmental damage.

(4) The plan approved by the department for submission to the court shall not be considered to be an adjudication subject to appellate review pursuant to R.S. 49:964 or R.S. 30:12.

(5) The court shall adopt the plan approved by the department, unless a party proves by a preponderance of the evidence that another plan is a more feasible plan to adequately protect the environment and the public health, safety, and welfare. The court shall enter a judgment adopting a plan with written reasons assigned. Upon adoption of a plan, the court shall order the party or parties admitting responsibility or the party or parties found legally responsible by the court to fund the implementation of the plan.

(6)(a) Any judgment adopting a plan of evaluation or remediation pursuant to this Section and ordering the party or parties admitting responsibility or the party or parties found legally responsible by the court to deposit funds for the implementation thereof into the registry of the court pursuant to this Section shall be considered a final judgment pursuant to the Code of Civil Procedure Article 2081 et seq., for purposes of appeal.

(b) Any appeal under this Section shall be a de novo review and shall be heard with preference and on an expedited basis.

(c) The appellate court may affirm the trial court's adoption of a plan or may adopt a feasible plan in conformity with this Section and shall issue written reasons for its decision.

D. (1) Whether or not the department or the attorney general intervenes, and except as provided in Subsection H of this Section, all damages or payments in any civil action, including interest thereon,

awarded for the evaluation or remediation of environmental damage shall be paid exclusively into the registry of the court in an interest-bearing account with the interest accruing to the account for clean up.

(2) The court may allow any funds to be paid into the registry of the court to be paid in increments as necessary to fund the evaluation or remediation and implementation of any plan or submittal adopted by the court. In any instance in which the court allows the funds to be paid in increments, whether or not an appeal is taken, the court shall require the posting of a bond for the implementation of the plan in such amount as provided by and in accordance with the procedures set forth for the posting of suspensive appeal bonds. Any such bond shall be valid through completion of the remediation.

(3) The court shall issue such orders as may be necessary to ensure that any such funds are actually expended in a manner consistent with the adopted plan for the evaluation or remediation of the environmental damage for which the award or payment is made.

(4) The court shall retain jurisdiction over the funds deposited and the party or parties admitting responsibility or the party or parties found legally responsible by the court until such time as the evaluation or remediation is completed. If the court finds the amount of the initial deposit insufficient to complete the evaluation or remediation, the court shall, on the motion of any party or on its own motion, order the

party or parties admitting responsibility or found legally responsible by the court to deposit additional funds into the registry of the court. Upon completion of the evaluation or remediation, the court shall order any funds remaining in the registry of the court to be returned to the depositor. The department and the parties shall notify the court of the completion of any evaluation or remediation.

E. (1) In any civil action in which a party is responsible for damages or payments for the evaluation or remediation of environmental damage, a party providing evidence, in whole or in part, upon which the judgment is based shall be entitled to recover from the party or parties admitting responsibility or the party or parties found legally responsible by the court, in addition to any other amounts to which the party may be entitled, all costs attributable to producing that portion of the evidence that directly relates to the establishment of environmental damage, including, but not limited to, expert witness fees, environmental evaluation, investigation, and testing, the cost of developing a plan of remediation, and reasonable attorney fees incurred in the trial court and the department.

(2) In any civil action in which the department or the attorney general, or their employees, are parties or witnesses, provide evidence, or otherwise contribute to the determination of responsibility for evaluation or remediation, or the approval of a plan of remediation, the department or attorney general shall be entitled to recover from the party or parties

admitting responsibility or the party or parties found legally responsible by the court all costs thereof, including but not limited to investigation, evaluation, and review costs; expert witness fees; and reasonable attorney fees.

F. The court and the department shall retain oversight to ensure compliance with the plan. The party or parties admitting responsibility or the party or parties found legally responsible by the court shall file progress reports periodically as the court or the department may require.

G. The provisions of this Section are intended to ensure evaluation or remediation of environmental damage. If the court finds that no environmental damage exists, the court may dismiss the department or attorney general from the litigation without prejudice.

H. This Section shall not preclude an owner of land from pursuing a judicial remedy or receiving a judicial award for private claims suffered as a result of environmental damage, except as otherwise provided in this Section. Nor shall it preclude a judgment ordering damages for or implementation of additional remediation in excess of the requirements of the plan adopted by the court pursuant to this Section as may be required in accordance with the terms of an express contractual provision. Any award granted in connection with the judgment for additional remediation is not required to be paid into the registry of the court. This Section shall not be interpreted to create

any cause of action or to impose additional implied obligations under the mineral code or arising out of a mineral lease.

I. For the purposes of this Section, the following terms shall have the following meanings:

(1) "Environmental damage" shall mean any actual or potential impact, damage, or injury to environmental media caused by contamination resulting from activities associated with oilfield sites or exploration and production sites. Environmental media shall include but not be limited to soil, surface water, ground water, or sediment.

(2) "Evaluation or remediation" shall include but not be limited to investigation, testing, monitoring, containment, prevention, or abatement.

(3) "Feasible Plan" means the most reasonable plan which addresses environmental damage in conformity with the requirements of Louisiana Constitution Article IX, Section 1 to protect the environment, public health, safety and welfare, and is in compliance with the specific relevant and applicable standards and regulations promulgated by a state agency in accordance with the Administrative Procedure Act in effect at the time of clean up to remediate contamination resulting from oilfield or exploration and production operations or waste.

(4) "Oilfield site" or "exploration and production (E&P) site" means any location or any portion thereof on which oil or gas exploration, development, or

production activities have occurred, including wells, equipment, tanks, flow lines or impoundments used for the purposes of the drilling, workover, production, primary separation, disposal, transportation or storage of E&P wastes, crude oil and natural gas processing, transportation or storage of a common production stream of crude oil, natural gas, coal seam natural gas, or geothermal energy prior to a custody transfer or a sales point. In general, this definition would apply to all exploration and production operations located on the same lease, unit or field.

(5) "Timely notice" means written notice sent by certified mail, return receipt requested. Such notice shall include a copy of the petition and any other filing in such litigation.

J.(1) In the event that any settlement is reached in a case subject to the provisions of this Section, the settlement shall be subject to approval by the court. The department and the attorney general shall be given notice once the parties have reached a settlement in principle. The department shall then have no less than thirty days to review that settlement and comment to the court before the court certifies the settlement. If after a contradictory hearing the court requires remediation, the court shall not certify or approve any settlement until an amount of money sufficient to fund such remediation is deposited into the registry of the court. No funding of a settlement shall occur until the requirements of this Section have been satisfied. However, the court shall have the discretion to waive the requirements of this Section if

the settlement reached is for a minimal amount and is not dispositive of the entire litigation.

(2) In the event a settlement is agreed to between the parties in a case in which the department or the attorney general has intervened, such agency shall be entitled to recover from the settling defendants all costs, including investigation, evaluation, and review costs; expert witness fees; and reasonable attorney fees.

K. The provisions of this Section shall not apply to a judicial demand that prior to the effective date of this Section has been resolved through compromise agreement and settlement of claims, or by judgment on the merits that has become final and definitive.

CREDIT(S)

Added by Acts 2006, No. 312, § 1, eff. June 8, 2006.

NOTICE; APPLICATION--ACTS 2006, NO. 312

<"Sections 2 and 3 of Acts 2006, No. 312 (§ 1 of which enacted this section) provide:>

<"Section 2. Where the litigation or pleading making a judicial demand, arising from or alleging environmental damage, has been filed or amended as of June 8, 2006, the party who filed or amended same shall provide timely notice as provided in R.S. 30:29(I)(5) within sixty days after June 8, 2006.>

<"Section 3. The provisions of Section 1 of this Act shall not apply to any case in which the court on or before March 27, 2006, has issued or signed an order

setting the case for trial, regardless of whether such trial setting is continued. However, any party or parties who filed such a judicial demand shall have the right to have such litigation governed by all the provisions of R.S. 30:29 and 29.1 by filing with the court in which such litigation has been filed a notice of the exercise of such right within sixty days of June 8, 2006.">